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No. 95 434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EMPLOYERS INSURANCE OF WAUSAU,
A Mutual Company,
Petitioner,

v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Section 106(b)(2)(A) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provide federal jurisdiction and a limited, deferential standard and scope of judicial review of agency action?

2. Does Section 106 of CERCLA authorize the United States Environmental Protection Agency to impose joint and several liability administratively, without qualification, through *ex parte*, unilateral cleanup orders?

3. Does the Due Process Clause of the Fifth Amendment authorize the denial of a judicial hearing on a party's statutory liability following a coerced, administrative deprivation of the party's property?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Employers Insurance of Wausau, A Mutual Company, and respondents: William J. Clinton, in his official capacity as President of the United States; Carol M. Browner, as Administrator of the United States Environmental Protection Agency; the United States Environmental Protection Agency; and, the United States of America.[1]

Pursuant to Supreme Court Rules 14.1(b) and 29.1, Petitioner states that Petitioner has neither a parent corporation nor any non-wholly-owned subsidiary.

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[1] In addition, the following individuals were named as parties below in their official capacities: Valdas Adamkus, as Regional Administrator of Region V of the United States Environmental Protection Agency; Bruce M. Diamond, as Director of the Office of Waste Programs Enforcement of the Environmental Protection Agency; and William E. Muno, as Acting Director of the Office of Waste Programs Enforcement of the United States Environmental Protection Agency.

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OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, dated April 12, 1995, is reported at 52 F.3d 656, and is reproduced at pages 1-18 of the Appendix to this Petition (Pet. App.). The relevant opinions of the United States District Court for the Northern District of Illinois are reported at 848 F. Supp. 1359 and 848 F. Supp. 1369, and are reproduced at Pet. App. 19-38 and 39-60, respectively.

The Order of the United States Court of Appeals for the Seventh Circuit denying rehearing and denying rehearing *en banc*, dated May 17, 1995, is not yet reported and is reproduced at Pet. App. 74.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1995. Pet. App. 18. The Court of Appeals denied a timely Petition for Rehearing on May 17, 1995. Pet. App. 74. On August 2, 1995, Justice Stevens granted Petitioner an enlargement of time to file this Petition for a Writ of Certiorari until September 14, 1995. Pet. App. 75. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition primarily involves Section 106(b) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. § 9606(b).[2]

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[2] *See* CERCLA § 106, 42 U.S.C. § 9606, at Pet. App. 62-64. CERCLA § 106(b)(2), incorporating CERCLA § 106(a), and referring to liability provisions at CERCLA § 107(a), was amended

(continued...)

STATEMENT OF THE CASE

Petitioner seeks review of a decision by the United States Court of Appeals for the Seventh Circuit in one of the most significant cases involving CERCLA, 42 U.S.C. §§ 9601 *et seq.*, decided since the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA).[3]

Within a matter of months, the Seventh and Eighth Circuits decided two remarkably similar cases involving CERCLA § 106(b)(2), each finding federal jurisdiction in two separate parts of the same provision. The Seventh Circuit found federal jurisdiction for "judicial review" of Agency adjudicatory determinations under CERCLA § 106(b)(2)(A). Then, applying newly-created standards of judicial review, the Seventh Circuit held that Petitioner was not entitled to *any* judicial relief.

On the other hand, the Eighth Circuit refused to read "judicial review" into CERCLA § 106(b)(2), finding instead that Congress provided *potentially* responsible parties with an independent cause of action pursuant to CERCLA §106(b)(2)(B) to seek reimbursement and a determination of their disputed liability and a resolution of any other claims against the Agency based upon the Agency's arbitrary and capricious selection or enforcement of the remedy. The Eighth Circuit identified support for its interpretation in the plain reading of the statute and in two recent opinions decided by the D.C. Circuit.

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[2] (...continued)
in 1986 by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613, *et seq.*

[3] Hereafter, Petitioner will cite to CERCLA's internal numbering system, CERCLA §§ 101 *et seq.*, rather than the citation form of the United States Code, 42 U.S.C. §§ 9601 *et seq.*

Finally, the Seventh and the Eighth Circuits cited entirely different policy considerations. The Seventh Circuit analyzed the reimbursement provision as part of a "clean-up" statute, while the Eighth Circuit found that the reimbursement statute had a "remedial" purpose to protect *potentially* responsible parties.[4]

The facts of this case illustrate the significant legal issues at stake.

Following a fire at its policyholder's building in Wyandotte, Michigan, Petitioner paid $4,189.25 on behalf of its policyholder for the removal of *PCB-free* fluids from six, fire-damaged transformers. However, the policyholder's disposal contractor co-mingled other fluids with the fluids from the PCB-free, fire-damaged transformers, and delivered all of the fluids to the CIW Site in Romulus, Michigan. One of CIW's customers discovered the presence of PCBs.

Thereafter, the United States Environmental Protection Agency (USEPA or the Agency) became involved in the investigation at the CIW Site. The Agency unilaterally "determined" that various parties, including Petitioner, were liable under CERCLA § 107(a), and issued the unilateral administrative order (the UAO) at issue here. The Agency unilaterally "determined" that Petitioner was liable under CERCLA § 107(a)(3), as a party who "arranged" for the disposal of PCBs, based upon the check to its policyholder.

Petitioner denied all liability and demanded a prompt hearing. The Agency denied Petitioner's request for a hearing, and further refused to disclose its evidence of Petition-

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[4] The Seventh Circuit's ruling further endorsed the administrative imposition of joint and several liability in *all* cases under CERCLA § 106(a), contrary to recent decisions of the Second, Third and Fifth Circuits. The ruling, moreover, denied Petitioner judicial review of its statutory liability, in violation of the due process clause.

er's alleged liability. Faced with the UAO and the penalties associated therewith (*see* CERCLA § 106(b)(1)), Petitioner proceeded to negotiate a work plan with the Agency to address the "emergency removal action" described in the UAO. No other recipient of the UAO responded.

The UAO was written broadly to encompass numerous hazardous substances at the Site. Petitioner's *potential* liability, however, was not as broad as the order, and was associated only with the alleged shipment of PCB-free transformer fluids from fire-damaged transformers, which, through no fault of Petitioner, had been contaminated by others with PCBs.

In that context, Petitioner negotiated the "removal" action work plan with the Agency primarily limited to PCBs (and in good faith, following some compromise, to other activities associated with PCB-free hazardous waste). As soon as the Agency approved the work plan, Petitioner began implementing it.

Almost immediately the Agency reneged on the work plan, and sought to enforce the broadly written UAO as if the owner/operator (with the broader scope of liability connected to every substance at the entire site) had been involved. Long after all of the work at the Site had been completed, the Agency's chief complaint with Petitioner's clean-up activities rests not with the actions Petitioner performed, but rather with the activities Petitioner did not perform solely involving *PCB-free materials* at the site. There is no question that Petitioner *completed* the emergency removal action associated with PCBs (and the hazardous wastes), *and* there is no question that Petitioner abated any "imminent and substantial endangerment" involving PCBs which may have justified the UAO. In short, the Agency simply claims that Petitioner is liable for more, *and* that it has the *authority* to impose joint and several liability, for

all materials at a site—even when, as here, the alleged harm at the Site is unquestionably divisible.[5]

Following completion, and within the time prescribed by law, Petitioner filed an administrative petition seeking reimbursement from the Superfund alleging that it was not liable, and that Petitioner was entitled to reimbursement either under CERCLA §§ 106(b)(2)(C) or (D). Pursuant to the reimbursement statute, the Agency reviewed Petitioner's claim in its pre-litigation opportunity to resolve the issues. *See* CERCLA § 106(b)(2)(A). Following a tortured administrative "process," in which the Agency afforded Petitioner no hearing (or other procedural protections) and followed no timetable to ensure a prompt resolution of Petitioner's claims, the Agency denied the administrative petition on the grounds that Petitioner had not "completed" all of the work specified in the UAO—specifically, certain work directed solely at PCB-free materials. Accordingly, because in the Agency's view, Petitioner had not "complied" with the UAO, it was not entitled to reimbursement—regardless of whether Petitioner was innocent under CERCLA, or not.

Following the Agency's "refusal to grant" Petitioner's administrative claim, and within the time prescribed by law, Petitioner filed the instant action in the District Court for the Northern District of Illinois. Without allowing any discovery (and thus limiting its ruling to the Agency's administrative record), the District Court entered Summary Judgment against Petitioner. The District Court was unable to find federal jurisdiction for the limited judicial review suggested by Agency, and, instead, "defaulted" to the "judicial review" provisions found under the Administrative Procedure Act (APA), 5 U.S.C. § 706. In a related decision, the

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[5] The Circuit Court and the District Court candidly acknowledged that the Agency could not have enforced the order as such in court. See Pet. App. 4, 54-55 n.13.

District Court also entered judgment on the pleadings on Petitioner's constitutional claims holding, that, even though the UAO was clearly broader than Petitioner's potential liability (see Pet. App. 54-55 n. 13), Petitioner's constitutional alternatives were either complete *defiance* of the UAO or complete *compliance* with the UAO.

Petitioner timely filed an appeal and, on April 12, 1995, the Seventh Circuit affirmed the District Court's rulings. The Circuit Court held that, even though the UAO was clearly *unenforceable* in court (Pet. App. 4), Petitioner's failure to complete the unenforceable activities precluded any judicial relief. Pet. App. 17. Moreover, the Seventh Circuit held that the Agency's interpretation of its own cleanup orders—and "compliance" therewith—was entitled to deferential "judicial review." While affirming the District Court's ruling, the Seventh Circuit did not affirm the District Court's finding of federal jurisdiction under the APA, but rather, interpreted federal jurisdiction within the statute at CERCLA § 106(b)(2)(A)—contrary to the finding of the District Court, the statutory reference pleaded by Petitioner at CERCLA § 106(b)(2)(B), and the law in the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

I.

FEDERAL JURISDICTION AND THE SCOPE AND STANDARDS OF JUDICIAL INVOLVEMENT IN CERCLA REIMBURSEMENT ACTIONS ARE SERIOUSLY UNSETTLED IN THE DISTRICT AND CIRCUIT COURTS. THIS COURT SHOULD CLARIFY THE BASIS OF FEDERAL JURISDICTION AND THE SCOPE AND STANDARDS OF REVIEW IN REIMBURSEMENT ACTIONS BROUGHT PURSUANT TO CERCLA § 106(b)(2)(B).

It suffice to say that there are, at least, four fully developed interpretations of federal jurisdiction, and the closely

related questions involving the scope of judicial involvement and the standard and scope of review, in the statutory reimbursement statute provided at CERCLA § 106(b)(2): (1) the Agency's view; (2) the District Court's view; (3) the Seventh Circuit Court of Appeal's view; and, (4) the Eighth Circuit Court of Appeal's view.

Both the District Court and the Seventh Circuit Court of Appeals responded to the Agency's view while the Eighth Circuit Court of Appeals flatly rejected it. Moreover, while neither the District Court nor the Seventh Circuit fully accepted the Agency's statutory interpretation of the reimbursement statute, both Courts affirmed the Agency's administrative determinations. Therefore, it is necessary to sketch the details of the Agency's arguments in hopes of persuading this Court to grant certiorari, and to allow the parties an opportunity to fully brief their respective arguments on federal jurisdiction.

A. In The Agency's View, Federal Jurisdiction Is Provided By CERCLA § 106(b)(2)(B), Yet, That Federal Jurisdiction Is Limited By The Unilateral, *Ex Parte* Determinations Made By The Agency, Which Determinations Are Reviewable By A Federal Court Only Pursuant To A Deferential Standard And Scope Of Review.

In essence, the Agency argued that Petitioner had failed to "meet the statutory threshold requirement[s]" for filing an administrative petition for reimbursement. By the so-called "statutory threshold requirements," the Agency referred to its interpretation of CERCLA § 106(b)(2)(A), *and* the Agency's interpretation of the Agency's administrative role in reviewing a Petition for Reimbursement. The Agency concluded that Congress had invested the Agency with authority to thwart a *potentially* responsible party seeking reimbursement, if that party had not "complied" with the Agency's interpretation of the law and the Agency's inter-

pretation of its order, and, in the final analysis, had not "completed" all of the activities ordered by the Agency based upon the Agency's interpretation of the law and the Agency's interpretation of its order. According to the Agency, the punishment for "failing" to meet the Agency's interpretation of the "statutory threshold requirements" could be meted out by the Agency in the form of denying Petitioner access to the judiciary on Petitioner's claims (that is, the "merits" of the petition for reimbursement), whether those claims are in the nature of a claim alleging non-liability or arbitrary and capricious Agency action.

The Agency conceded that it had "refused to grant" Petitioner's administrative petition for reimbursement, and that the Agency's action was final. Moreover, the Agency conceded that some judicial review was in order because Petitioner had timely filed an action in federal court seeking judicial review under CERCLA § 106(b)(2)(B). But, according to the Agency, the review provided by CERCLA § 106(b)(2)(B) was limited in three ways, none of which are provided for in the reimbursement statute.

First, according to the Agency, the Agency's *substantive administrative decision* denying the administrative Petition for Reimbursement based on the Agency's determinations of "non-compliance" was entitled to the "familiar" deferential *standard* of review, citing this Court's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) as authority.[6] Neither the District Court nor the Circuit Court agreed with this part of the Agency's interpretation of *Chevron*, although both courts applied a deferential *standard* of review after finding significantly different bases for federal jurisdiction, both of which run

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[6] Of course, the principles announced in *Chevron* do not apply to the Agency's *substantive* adjudicatory determinations.

afoul of the principles articulated by this Court in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990).

Second, without any statutory support, the Agency argued that the *scope* of the judicial review was also deferential, and was limited to the administrative record prepared exclusively by the Agency because: (1) CERCLA administrative orders are "complicated," and the District Court should defer to the Agency's perceived expertise; and that, (2) "as general rule" judicial review of agency action is confined to the administrative record, citing cases with administrative records prepared after formal (that is, adjudicatory administrative proceedings), or informal "rule making" cases which obviously do not involve individual adjudicatory or liability issues.[7] However, in this case the record was "informal," *and the proceedings involved substantive adjudications*.

Both the District Court and the Circuit Court applied a deferential standard and scope of review, but each was based on entirely different jurisdictional grounds. The District Court found federal jurisdiction under the APA (and a deferential standard and scope of review thereunder—with *no* analysis of the scope of review). And, the Circuit Court, troubled by both the Agency's approach and the District Court's finding of jurisdiction under the APA, stubbornly found federal jurisdiction under CERCLA § 106(b)(2)(A) (which, by its terms does not provide for final Agency action), and then pedantically applied a deferential stan-

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[7] *See Wagner Electric Co. v. Thomas*, 612 F.Supp. 736, 747 (D. Kan. 1985) (where the only District Court to review the very "informal" administrative process severely criticized that process, and held that judicial review would not be limited to the informal administrative record prepared exclusively by the Agency). The Agency too must concede that the administrative "process" was lacking, inasmuch as the Agency recently delegated *some* of the review function to the Environmental Appeals Board (EAB). In this case, nothing was resolved—every fact is in dispute.

dard and scope of judicial review under its own, newly-created cause of action.

Third, and contrary to this Court's analysis in *Adams Fruit*, the Agency argued that the District Court lacked *jurisdiction* to review *any* issue which the Agency had not reviewed in the administrative proceedings—which, in this case meant, that the District Court could not review Petitioner's purported liability, *because the Agency argued that it had not done so administratively* (suggesting that the Agency had jurisdiction to decide liability in the "first instance" and, citing the D.C. Circuit Court's opinion in *Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct. 1584 (1992) as supporting authority), and suggesting also that the *Agency, by its actions* provided the federal court with federal jurisdiction. And, contrary to its concession of finality, the Agency argued, that should the Court find in favor of Petitioner, the Agency should have an opportunity to re-review Petitioner's administrative petition on the merits (that is, pass on Petitioner's liability), citing this Court's opinion in *Camp v. Pitts*, 411 U.S. 138, 142-143 (1973) as authority. Both the District Court and the Circuit Court agreed with the Agency on this point, and limited their respective "review" to only the issue of compliance the Agency admitted reviewing in the administrative process, and refused to review the Agency's unilateral, *ex parte* determination of Petitioner's purported and denied liability, although neither court considered the principles articulated by this Court in *Adams Fruit*.[8]

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[8] After reviewing this Court's opinion *Adams Fruit*, the D.C. Circuit Court of Appeals in *Wagner Seed* established the limits of its holding as follows: "If the EPA had attempted to determine the manner in which a person seeking reimbursement must 'file an action', or which is 'the appropriate United States District Court', under § 106(b)(2)(B), the rationale of *Adams Fruit* would seem to

(continued...)

B. In The District Court's View, The Reimbursement Statute Failed To Provide Federal Jurisdiction For A Limited Review Of Issues Determined By The Agency Pursuant To CERCLA § 106(b)(2)(A), But Some Limited Judicial Review Is Available With Federal Jurisdiction Therefor Under The Administrative Procedure Act Following A Deferential Standard And Scope Of Review.

The District Court struggled first with federal jurisdiction under the Agency's construction of the statute, candidly recognizing that:

> [T]here is no explicit provision for review of the EPA's determination that a party did not "comply" with the relevant Order, and is thus not entitled to consideration of its petition on the merits. Indeed, there is nothing in the statute to indicate that the drafters of CERCLA even contemplated that this may be an issue; rather, their sole focus was providing for review of the EPA's ruling on the merits of a reimbursement petition.

Pet. App. 29.

Exactly. And in the context of federal jurisdiction, the District Court had no trouble correctly distinguishing the cases cited by the Agency in support of the Agency's claim of *Chevron* deference for its *substantive* determinations, and found that both *Wagner Seed* and *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323 (7th Cir. 1990) "provide us with little guidance." Pet. App. 29-30 n.9. Nonetheless, even after finding that the reimbursement statute did not provide for "judicial review" of the Agency's determinations under

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[8] (...continued)
apply." *Wagner Seed*, 946 F.2d at 923. Moreover, in *Kelley v. EPA*, 15 F.3d 1100, 1107-1108 (D.C. Cir. 1994) *reh'g denied*, 25 F.3d 1088, 1090-92 (D.C. Cir. 1994), *cert. denied, sub nom. American Banker's Association v. Kelley*, 115 S.Ct. 900 (1995), the D.C. Circuit Court amplified its previous holding in *Wagner Seed*, holding, *inter alia*, that the Agency did not have jurisdiction to determine liability in any event.

CERCLA § 106(b)(2)(A) (in this case, the Agency's limited determination of "compliance"—as that term was *interpreted* by the Agency), with no explanation, the District Court simply concluded that *some* judicial review *must* be available on the limited issue "determined" by the Agency, but, apparently, not in the context of the CERCLA § 106(b)(2)(B) cause of action pleaded by Petitioner.

The District Court tried to fashion federal jurisdiction for the *limited* "judicial review" of CERCLA § 106(b)(2)(A) issues out of the reimbursement statute, but concluded that because the reimbursement statute offered "competing standards of review," the court could not "infer the authority for judicial review" from the statute. Pet. App. 30. But, because the District Court had concluded that *some* review *must* be available (but again, with no explanation or authority to review the essentially unreviewable), the District Court simply "defaulted" to the APA. Pet. App. 31.

Also, without analyzing *Adams Fruit* or its *Chevron* deference, the District Court agreed with the Agency's construction of the statute, and limited the APA judicial review to only the issues *purportedly reviewed by the Agency*—rather than to the obviously broader issues raised by Petitioner in the CERCLA § 106(b)(2)(B) action then pending before the Court. In essence, the District Court created a new cause of action under the reimbursement statue, using the APA for federal jurisdiction, and, then simply applied a deferential *standard* and *scope* of review after he had candidly admitted that neither had been provided by Congress. The District Court's finding of federal jurisdiction under the APA is contrary to CERCLA § 113(h). *See* Pet. App. 70.

C. In The Seventh Circuit's View, The Reimbursement Statute Provides Federal Jurisdiction At CERCLA § 106(b)(2)(A) For A Limited Review Of Issues Determined Exclusively By The Agency Pursuant To CERCLA § 106(b)(2)(A), And That Review Was Deferential To The Agency.

On appeal, the Seventh Circuit Court of Appeals also struggled with the question of federal jurisdiction in reviewing the Agency's ostensibly unreviewable determinations made pursuant to CERCLA § 106(b)(2)(A). But, contrary to the District Court, the Circuit Court construed the statute and found independent federal jurisdiction for "judicial review" under CERCLA § 106(b)(2)(A):

> The right of reimbursement extends to "any person who receives and complies with the terms of [any order]," and ripens into a right to petition *and to sue* "after completion of the required action." § 9606(b)(2)(A).

Pet. App. 8 (emphasis added).

And, like the District Court, the Circuit Court also limited the "judicial review" to only the issue "determined" *by the Agency* in the administrative proceedings, and refused to hear the broader issues (e.g., liability and the issues involving the arbitrary and capricious remedy selection and enforcement issues) raised by Petitioner in the reimbursement action under CERCLA § 106(b)(2)(B), again, with no analysis of the principles announced by this Court in *Adams Fruit*. Pet. App. 7.

In any event, the Circuit Court found federal jurisdiction for "judicial review" (limited to the Agency determinations) within the statute, while the District Court *specifically* held otherwise. Moreover, the Circuit Court rejected the District Court's finding of federal jurisdiction under the APA.

D. In The Eighth Circuit's View, Congress "Quite Consciously" Provided Federal Jurisdiction Only At CERCLA § 106(b)(2)(B), Which Provides A Federal Court With Full Jurisdiction To Hear All Issues *De Novo*, Completely Unaffected By The Issues Determined By The Agency In The Administrative Proceedings Described at CERCLA § 106(b)(2)(A).

Also, two other federal Circuit Courts have confirmed the District Court's conclusion that Congress did not intend for the judiciary to review the Agency's actions under CERCLA § 106(b)(2)(A), *except* in the context of the *de novo* cause of action provided at CERCLA § 106(b)(2)(B).

1. In *Dico v. Diamond*, 35 F.3d 348 (8th Cir. 1994), the Eighth Circuit reversed the District Court's entry of summary judgment in favor of the Agency on the limited issues determined administratively by the Agency under CERCLA § 106(b)(2)(A). In that case, Dico, the *potentially* responsible party, was seeking reimbursement for the costs it reasonably incurred in abating an alleged "imminent and substantial endangerment" associated with a release of trichloroethylene (TCE). Based upon its administrative determinations, the Agency had denied Dico's administrative claim, and again, like here, and the Agency "did not reach the question" of the "merits" of the Petitioner's claim (a/k/a Dico's purported, and unreviewed liability), as if the Agency had jurisdiction to "determine" liability—which is obviously *not* a "technical" question entitled to deference. *Id.* at 350.

The District Court in Iowa, like the District Court here, construed the statute as argued by the Agency, and limited its review to the issue the Agency purported to "determine" administratively, and entered summary judgment in favor of the Agency, holding that Dico was not entitled to judicial relief. Also, like here, the *potentially* liable party contended that there was no genuine dispute that Dico could not have been held liable in court for the TCE associated with the "northern plume," because it was not even physically con-

nected to Dico's property and was physically up-gradient. (*See* Judge Posner's "Cherynobl" example. Pet. App. 11-12.) Nonetheless, the *Dico* District Court held:

> Whether a factual dispute exists in this case over who is liable for the northern plume of contamination is not material to disposition of the motions for summary judgment. The court agrees with [the Agency's] position that this case does not call for judicial review of the substance of Dico's reimbursement claim under the standard set forth in section 9606(b)(2)(C), but rather for judicial review of the statutory prerequisites for bringing such a claim; i.e., whether Dico is a "person who receive[d] and complie[d]" with an order under section 9606(b)(2)(A).

Dico v. Diamond, 821 F.Supp. 562, 568 (S.D. Iowa 1993) (emphasis added) (citing *Wagner Seed*, 946 F.2d at 921). Like the Seventh Circuit, the District Court in Iowa had found federal jurisdiction for judicial review under CERCLA § 106(b)(2)(A).

On appeal, however, the Eighth Circuit reversed the *Dico* District Court, finding first that the Agency's statutory construction was not entitled to *Chevron* deference, and finding instead that the principles of *Adams Fruit* were appropriate.[9] Moreover, the Eighth Circuit confirmed that there is no federal jurisdiction for "judicial review" at CERCLA § 106(b)(2)(A):

> The statute nowhere uses the word "arbitrary" or "capricious" or any other words implying that "review" of

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[9] *See also Kelley*, 25 F.3d at 1092 ("The structure of the [reimbursement statute] is flatly inconsistent with *Chevron*"). It is curious that any court would seriously consider deference to the Agency under the reimbursement statute. The burden of proof is on the *potentially* responsible party to prove non-liability (rather than on the Agency to prove liability). How could anyone infer deference to the party who has no burden?

> an agency action "on the record" or "on the administrative record" was intended by Congress. *We decline to read language of judicial review into the section*, particularly in light of the fact that Congress is accustomed to including provisions for judicial review in statutes when that is what it intends.

35 F.3d at 351 (emphasis added).

Moreover, in the context of analyzing the deference principles under *Chevron* and *Adams Fruit*, the Eighth Circuit recognized that:

> [The Agency] must construe the reimbursement provision as a predicate to its action under § 106(b)(2)(A). However, that the EPA is given an opportunity to resolve the matter prior to litigation does not alter the language of § 106(b)(2)(B) which "has expressly established the Judiciary . . . as the adjudicator of private rights of action arising under the [section][citing *Adams Fruit*, 494 U.S. at 649], and also does not provide a means by which the EPA may "bootstrap itself into an area in which it has no jurisdiction".

Id. at 352 (citing *Adams Fruit*, 494 U.S. at 650) (internal citations omitted).

In other words, according to the Eighth Circuit: (1) there is no federal jurisdiction for "judicial review" under CERCLA § 106(b)(2)(A); and, (2) CERCLA § 106(b)(2)(A) is only a basic description of the Agency's purely administrative role, which is only part of the overall reimbursement statute (a pre-litigation, *administrative* opportunity to resolve the matter before it goes to the Judiciary); and, (3) the *only* federal jurisdiction available under the reimbursement statute is provided at CERCLA § 106(b)(2)(B); and, (4) that federal jurisdiction, consistent with *Adams Fruit*, is *completely unaffected by* anything the Agency does in the administrative proceedings, which provides an alleged *potentially* responsible party with an unfettered opportunity

to be heard *de novo* in federal court on its claims asserting non-liability, or seeking reimbursement based on the Agency's arbitrary, capricious or unlawful selection or enforcement of the remedy.

Clearly, the Eighth Circuit and the Seventh Circuit conflict on every point. Only this Court is available to resolve these issues.

2. In addition to its analysis of *Chevron* factors and the principles of *Adams Fruit* on the issues involving the Agency's attempt to deny access to the judiciary, the Eighth Circuit also relied on the D.C. Circuit's recent analysis in *Kelley*. In the *Kelley* opinions, the D.C. Circuit was asked to review a challenge to the Agency's so-called "Lender Liability Rule," (40 C.F.R. § 300.1100) ostensibly prepared by the Agency in response to some public pandering following the Eleventh Circuit Court of Appeals' decision in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 752 (1991). In the legislative regulation at issue in *Kelley*, the Agency purported to provide some relief to the lending community, and established, by administrative regulation, "lender liability standards" and "safe harbors" from CERCLA liability. The Agency's legislative regulation was challenged by the State of Michigan and the Chemical Manufactures Association in the D.C. Circuit Court, wherein those petitioners alleged that the Agency had acted outside of the Agency's administrative authority in purporting to establish liability principles when Congress had not chosen to do so, and when Congress had not authorized the Agency to do so. Central to the Agency's argument in support of the "Lender Liability Rule," was the Agency's interpretation of its perceived authority under *Wagner Seed*.

In *Kelley*, the D.C. Circuit explained *its* previous holding in *Wagner Seed*, and criticized the Agency for overreading

it. 15 F.3d at 1105. According to the D.C. Circuit, *Wagner Seed* held that the Agency "had authority to interpret *certain* language of § 106 . . . that applied to EPA's *administrative responsibilities*." *Id.* (some emphasis added). But, the Court emphasized, the language which the Agency had interpreted in *Wagner Seed* did not bear on liability issues, and, the Court suggested that since Congress provided *de novo* review of the Agency's "particularized decision respecting liability", deference as to those issues would be inappropriate. *Kelley*, 15 F.3d at 1105. In the instant reimbursement action, there are no other "merits" to review, except Petitioner's liability and the Petitioner's claim against the Agency's arbitrary and capricious selection and enforcement of the remedy—based on Petitioner's putative liability. That is, there are *no other technical questions* for the Agency to review. Moreover, as in this case, because the Agency "attempted to define the manner in which a party sought judicial redress" the rationale of *Adams Fruit* clearly applies. *Id.* at 1105.

Also, according to the D.C. Circuit, the strongest argument made by the Agency was the same argument faced by Petitioner in this case and by Dico in the Eighth Circuit: "[The Agency's] role in implementing the reimbursement provisions of section 106(b)(2) implies authority to define liability." *Id.* at 1106.

In response, the D.C. Circuit carefully analyzed CERCLA § 106(b) and disagreed. *Id.* at 1106-1107. According to the D.C. Circuit, the reimbursement statute has two parts, one describing the administrative role of the Agency, and the second describing the proper role of the judiciary.

> Although a party must first petition EPA for reimbursement under subparagraph 106(b)(2)(A), that provision is *completely silent as to what criteria EPA uses to grant reimbursement*. If EPA denies reimbursement because the Agency contends the party is liable, the party has

> a right to bring an action in federal court under subparagraph 106(b)(2)(B); if the party establishes that it is not liable by *a preponderance of the evidence*, under subparagraph 106(b)(2)(C), it prevails. EPA is, under that scenario, only a defendant; its preliminary conclusion that the party is liable is entitled to no consideration, let alone the deference afforded to the typical administrative agency adjudication.

Id. at 1107 (some emphasis added). Moreover, according to the D.C. Circuit, Congress "quite consciously" distinguished the Agency's role under the reimbursement statute, and while Congress obviously intended to allow deference to the Agency's selection of the remedy pursuant to CERCLA § 106(b)(2)(D), "it does not seem that Congress intended the same *authority* with respect to subparagraphs 106(b)(2)(B) and (C)". *Id.* (emphasis added).

Therefore, according to the Eighth Circuit in *Dico*, the D.C. Circuit supported the Eighth Circuit's conclusion that CERCLA § 106(b)(2)(B) creates a "private right of action against EPA for reimbursement of response costs and explicitly establishes the judiciary as the adjudicator of the rights of the parties", making deference to the Agency on *any* issue inappropriate. *Dico*, 35 F.3d at 352 (citing *Adams Fruit*, 494 U.S. at 650).

II.

THE CIRCUITS ARE SPLIT ON THE APPROPRIATE POLICY CONCERNS AT ISSUE IN REIMBURSEMENT ACTIONS.

The difference between the Seventh and Eighth Circuits' decisions is obviously the way each Court viewed the reimbursement provision. The Seventh Circuit considered the "objective" of the reimbursement provision as "encouraging" prompt cleanups, although it is difficult to reconcile how a rule which encourages *complete defiance* of "broad" Agency

orders could ever be considered as encouraging prompt, *privately-funded* cleanup activity unless each order is tailored to each *potentially* liable party's putative liability—just as Petitioner had requested.[10]

The Eighth circuit, on the other hand, considered the reimbursement provision as "remedial legislation" to be read "broadly to accomplish its goals" of protecting the *potentially* liable parties affected by unilateral, *ex parte*, arbitrary, capricious and unlawful Agency action. *Dico*, 35 F.3d at 353. The difference in perspective is monumental, and the policy question posed by these two perspectives can only be resolved by this Court. Clearly, Congress focused its concerns on the issues facing *potentially* responsible parties, while balancing concerns over "compliance with orders" and "expeditious cleanups." If this Court grants certiorari, the parties will be free to brief this Court on Congress' "intentions" in drafting the reimbursement provision.

III.

THIS COURT SHOULD RESOLVE CONFLICTS AMONG THE CIRCUITS CONCERNING THE SCOPE OF CERCLA LIABILITY AND THE CONSTITUTIONALITY OF POST-DEPRIVATION PROCEDURES AFFORDED BY THE STATUTE.

In evaluating this case under CERCLA § 106(b)(2)(A) and deferring to the Agency, the Seventh Circuit approved the universal, administrative imposition of joint and several lia-

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[10] Moreover, based on its interpretation of the policy, the Seventh Circuit labeled as "absurd" Petitioner's argument that a non-liable party should always be reimbursed by a constitutional government. Pet. App. 10-11. Rather, it is an absurd construction of the statute that would deny judicial access to a party who had incurred only one cent in response costs.

bility pursuant to CERCLA § 106(a)[11] and further rendered such Agency liability determinations effectively unreviewable.

A. The Seventh Circuit's Conclusion That The Agency Universally May Impose Joint And Several Liability Under CERCLA § 106(a) Conflicts With Rulings Of The Second, Third and Fifth Circuits Concerning The Scope Of CERCLA Liability.

The Seventh Circuit's determination that the Agency administratively may impose joint and several liability, without qualification, through a CERCLA § 106(a) unilateral order conflicts with recent decisions of the Second, Third and Fifth Circuits which hold that, where there are distinct harms at a site or where there is a reasonable basis for apportioning a single harm, a party's CERCLA liability can extend *only* to that particular harm or portion of the harm that it caused. *See In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901-02 (5th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722-23 (2d Cir. 1993) ("*Alcan-PAS*"); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-70 (3d Cir. 1992) ("*Alcan-Butler*"). The Seventh Circuit's rule, unlike that of its sister circuits, is inconsistent with both the legislative history and the policies of CERCLA.

The Agency never has disputed that Petitioner's potential CERCLA liability with respect to the CIW Site extends, at most, to PCB contamination. *See* Pet. App. 4, 54-55 n.13. The Agency's decision to order Petitioner to remove materials at the Site other than PCBs thus amounted to an ad-

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[11] CERCLA § 107(a) defines which parties may be liable under the statute. *See Kelley*, 25 F.3d at 1090 (noting that "the drafters always came back to the liability provisions of section 107, which calls for a judicial determination"); *Kelley*, 15 F.3d at 1106-07.

ministrative determination that Petitioner is jointly and severally liable for all alleged contamination at the Site by virtue of just being there—without any nexus to liability. The Agency's subsequent conclusion that Petitioner did not "comply" with certain portions of the unilateral order that purportedly addressed non-PCB materials accordingly was not a "technical" decision but rather constituted a further embodiment of the Agency's administrative determination of Petitioner's joint and several CERCLA liability.

Having held that "compliance" with a CERCLA § 106(a) order, as measured by "completion" of all work mandated by the Agency, is an "express statutory condition" to obtaining reimbursement under § 106(b)(2) (even for an entirely innocent party), *see* Pet. App. 6, the Seventh Circuit acknowledged that "compliance need not be a matter of all or nothing" but instead stated that "substantial compliance" would satisfy its statutory threshold. *Id.* 10. The Court went on to indicate that the outer limits of "compliance" the Agency can demand are defined by the Agency's "powers," i.e., authority. *Id.* 12. Specifically, where a

> clean-up order is so grotesquely broad as plainly to exceed the agency's powers, the party against whom it is directed can comply with the valid part of the order and disregard the rest as void, a nullity, and having complied with the valid part seek reimbursement for the costs of that compliance. An order so completely ultra vires is no order for purposes of deciding whether compliance and completion have been achieved; the valid and the void commands in the order can be separated, and the void discarded.[12]

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[12] Applying an economic analysis to the law, the Circuit Court identified two apparent limits on the Agency's authority under CERCLA § 106(a): where "impossibility," "impracticability," or "frustration," based on a party's financial resources, precludes

(continued...)

Id. (citations omitted).

In applying this standard to the present case, the Seventh Circuit, ignoring decisions from other Circuit Courts, held that the Agency in fact possesses *authority* under the statute to order a single potentially responsible party to conduct all cleanup deemed necessary at a site, even where the harm is unquestionably divisible. The Court reasoned as follows:

> The agency takes the position, which may or may not be correct but is not irrational, that a polluter who wants to take advantage of the reimbursement provision may be required to clean up not only his own mess, as it were, but other messes at the same site. . . . The requirement that the reimbursement-seeker clean up the entire site could rationally be believed to contribute to the Act's central objective of promoting the clean-up of contaminated land. . . . EPA's desire to have one polluter clean up the entire site is not so flagrantly unreasonable as to entitle the polluter to disregard an order embodying that desire on the ground that the order is so plainly beyond the agency's power that it should be treated as a nullity.[13]

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[12] (...continued)
strict compliance; and where an order is "unreasonably, oppressively broad." Pet. App. 10-11. Although the Court did not specify the source of these limitations (i.e., the statute or the Constitution), it took pains to emphasize that neither was available to Petitioner. *Id.* 10.

[13] The Circuit Court did note that "there would be problem of the tail wagging the dog if the polluter responsible for only a tiny fraction of the contamination of the site were ordered to clean up the whole thing, perhaps because he had the deepest pocket of all the responsible parties." Pet. App. 13. Even given the undisputed divisibility of the harm at the CIW Site, the Court distinguished the "problem" circumstance from the case at hand simply by stating that "[i]t is not the situation here." *Id.*

Pet. App. 12-13. Because, in the Agency's view (to which the Seventh Circuit deferred), Petitioner did not complete all work within the scope of the unilateral order directed at divisible, PCB-free materials, the Circuit Court found that Petitioner had no right to a hearing on its CERCLA liability as to *any* of the materials at the Site. *See id.* 14-17.

However, in *Alcan-Butler*, the Third Circuit concluded that CERCLA neither mandates nor authorizes the uniform imposition of joint and several liability. *See* 964 F.2d at 268. To the contrary, that Court held that a responsible party only can be liable for the specific harm it caused either where there are distinct harms at a site or where there is a reasonable basis for determining the party's contribution to (i.e., apportioning) a single harm. *See id.* at 268-69. In adopting this analysis, the Court relied on the approach of the RESTATEMENT (SECOND) OF TORTS to ensure a uniform federal common law under CERCLA. *See id.* at 268 n.26. Perhaps most importantly, however, the Third Circuit ruled that a responsible party is entitled to a judicial hearing to establish the divisibility of harm at a site, and thus the limits of its CERCLA liability. *See id.* at 269-70. In decisions rendered shortly after *Alcan-Butler*, the Fifth and Second Circuits adopted virtually identical analyses.[14] *See Bell Petroleum*, 3 F.3d at 894-904; *Alcan-PAS*, 990 F.2d at 721-23.

Both the legislative history of and policies underlying CERCLA reflect "Congress['] inten[t] that the federal courts impose joint and several liability only in appropriate cases,

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[14] Two other Circuit Courts likewise have held that CERCLA liability cannot be joint and several where the harm at a site is divisible. *See O'Neil v. Picillo*, 883 F.2d 176, 178-79, 183 (1st Cir. 1989), *cert. denied sub nom. American Cyanamid Co. v. O'Neil*, 493 U.S. 1071 (1990); *United States v. Monsanto Co.*, 858 F.2d 160, 172-73 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

applying common law principles." *Bell Petroleum*, 3 F.3d at 901. The House and Senate each deleted, from its respective version of the bill enacted as CERCLA, a provision that would have mandated imposition of joint and several liability. As the Third Circuit explained:

> [T]he scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. 126 Cong. Rec. at S14964, S15004, H11787, H11799, 126 Cong. Rec. H9465 (Sept. 23, 1980) (remarks of Rep. Madigan), H9466 (Remarks of Rep. Stockman). The deletion was not intended as a rejection of joint and several liability. 126 Cong. Rec. S14964, H11787, H11799 (Nov. 24, 1980). Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multi-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.

Alcan-Butler, 964 F.2d at 268 (quoting *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983)). This flexible approach, accordingly, represents the balance between two competing goals of CERCLA: ensuring that those who cause environmental harm bear the costs of the harm; and protecting against harshness and unfairness to an individual defendant. *See* 1 Comm. on Env't & Pub. Works, *A Legislative History of the Comprehensive Environmental Response, Compensation & Liability Act of 1980*, S. Doc. No. 97-14, 97th Cong., 2d Sess. 320 (1983); *Bell Petroleum*, 3 F.3d at 902 n.13.

The Second, Third and Fifth Circuits all have recognized that the Agency has *no authority* to impose joint and several liability under CERCLA in a case, such as the present, where the harm at a site is divisible. The Seventh

Circuit's decision, which allows the Agency universally to impose joint and several administrative liability in issuing CERCLA § 106(a) unilateral orders, thus conflicts with the reasoning of these other Circuit Courts as well as the legislative history and policies of CERCLA.

B. The Seventh Circuit's Deference To The Agency's Administrative Liability Determination Conflicts With The First Circuit's Conclusion As To The Constitutionality Of Post-Deprivation Procedures Afforded By CERCLA.

By deferring to the Agency's "compliance" decision, the Seventh Circuit insulated the Agency's administrative imposition of joint and several liability from judicial review, thus denying Petitioner the right to any hearing on its alleged CERCLA liability (as it relates to either PCBs or PCB-free materials). In this respect, the Seventh Circuit's ruling conflicts with the First Circuit's conclusion that CERCLA's administrative procedures cannot deny a party a timely judicial hearing on its alleged liability. *See United States v. Reardon*, 947 F.2d 1509, 1523-24 (1st Cir. 1991). As the First Circuit recognized, CERCLA must be interpreted to ensure this fundamental due process right.

The Agency concedes that Petitioner never has been afforded a hearing, in any forum, on its alleged CERCLA liability. *See* Pet. App. 25 n.6. The Seventh Circuit dismissed Petitioner's due process challenges to the Agency's administrative liability determination, without analysis, simply by referring to one case in a line of decisions holding that, on their face, that CERCLA §§ 106 and 113(h) (the latter of which precludes pre-enforcement judicial review of

certain aspects of § 106(a) orders) are constitutional.[15] *See id.* 11 (citing *Solid State Circuits, Inc. v. United States Envtl. Prot. Agency*, 812 F.2d 383, 389-92 (8th Cir. 1987)). The Circuit Court did not acknowledge the due process ramifications of denying, as it did, Petitioner *any* hearing on its liability after a coerced deprivation of its property.

However, the First Circuit has held that a potentially responsible party, administratively deprived of its property by the Agency, must be afforded a timely judicial hearing to address its CERCLA liability. In *Reardon*, the First Circuit found unconstitutional the CERCLA provision allowing the Agency to impose a lien on a potentially responsible party's property without prior notice and without any hearing on the party's liability under the statute until the Agency elects, in its discretion, to bring an enforcement action. Those principles are indistinguishable from this case. *See* 947 F.2d at 1523-24; CERCLA § 107(l).

Applying *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and relying significantly on *Connecticut v. Doehr*, 501 U.S. 1 (1991), the First Circuit began its analysis by noting that a CERCLA lien constitutes a deprivation of a significant property interest.[16] *See* 947 F.2d at 1518-19. The First Circuit then concluded that, although the "mere postponement of judicial enquiry is not a denial of due process if the op-

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[15] *See also Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 294-96 (6th Cir. 1991); *Dickerson v. Administrator, Envtl. Prot. Agency*, 834 F.2d 974, 977-78 (11th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 314-17 (2d Cir. 1986). These Courts reached this result, however, under the assumption that a potentially responsible party in fact would receive a judicial hearing on its alleged liability at an appropriate time.

[16] The First Circuit indicated that "even [a] temporary or partial impairment[ ] to property rights . . . [is] sufficient to merit due process protection." 947 F.2d at 1518 (quoting *Doehr*, 501 U.S. at 12).

portunity given for ultimate judicial determination of liability is adequate," *id.* at 1519 (quoting *Phillips v. Commissioner*, 283 U.S. 589, 596 (1931)), CERCLA's lien provision "throws the 'ultimate judicial determination' so far into the future as to render it inadequate." *Id.* at 1519. The First Circuit thus equated the lien provision with the replevin statutes at issue in *Fuentes v. Shevin*, 407 U.S. 67 (1972), where this Court held that a party may not be "left in limbo to await a hearing that might or might not 'eventually' occur." 947 F.2d at 1520 (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 618 (1974) (discussing *Fuentes*)). Finally, the First Circuit found that, because the property owners subject to the lien disputed their CERCLA liability, the government had no "present, recognized interest in the property." *Id.* at 1521. While conceding that "additional procedural requirements are likely to place significant . . . administrative burdens on the government," the First Circuit held that "EPA has [no] legitimate interest in exceeding the limits of its authority under CERCLA" and that there is "nothing wrong with requiring EPA to delay filing notice of a lien until it can show that the statutory prerequisites for filing the notice [including establishing a party's liability] have been satisfied." *Id.* at 1523. The First Circuit, accordingly, concluded that the CERCLA lien provision, by not providing, at the very least, notice and a pre-deprivation hearing, violated the due process clause. *See id.* at 1523-24.

That the First Circuit's reasoning applies equally to a coerced, administrative deprivation of property pursuant to CERCLA § 106(a) is confirmed by the government's statements during congressional hearings preceding the enactment of § 106(b)(2). Although the Seventh Circuit construed CERCLA § 106 in a manner that denies an innocent party a judicial hearing on its alleged liability, it goes without saying that,

> if Congress completely proscribe[s] the federal courts from hearing a particular type of action, and no other relief [is] available, the action . . . violate[s] the Due Process Clause of the Fifth Amendment.

Earmet Aluminum, 927 F.2d at 295 (quoting *South Macomb Disposal Auth. v. Environmental Prot. Agency*, 681 F. Supp. 1244, 1251 (E.D. Mich. 1988)). The government, indeed, never intended that § 106(b)(2) be interpreted in this manner. To "protect against any due process violation," the government has acknowledged that § 106 must "provide for a full and fair day *in court* . . . before any party's monetary liability becomes fixed." *Reauthorization of Superfund: Hearings Before the Subcomm. on Water Resources of the House Comm. on Pub. Works and Transp.*, 99th Cong., 1st Sess. (1985) (comments of the Department of Justice) (emphasis added). Consistent with the First Circuit's ruling in *Reardon*, and as the government expressly has recognized, due process thus requires, at a minimum,[17] that a potential-

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[17] Two Circuit Courts have upheld the denial of a pre-deprivation hearing to the recipient of a CERCLA § 106(a) order given that such a party can refuse to comply with the order, challenge its liability in an ensuing enforcement action, and avoid statutory penalties by establishing in the enforcement action that it had "sufficient cause" justifying its refusal to comply. *See Solid State Circuits*, 812 F.2d at 390-92; *Wagner Seed*, 800 F.2d at 315-17; *see also* CERCLA §§ 106(b)(1), 107(c)(3). Neither Court, however, considered a case, such as the present, where the Agency deliberately refused to disclose the evidence allegedly supporting its administrative liability determination during the limited time period the Agency allowed a recipient to evaluate whether that party in fact had "sufficient cause" to ignore an order. *See Gonzales v. United States*, 348 U.S. 407, 415 (1955). In addition to a full post-deprivation judicial hearing, due process also must require that the Agency disclose its liability evidence to an order recipient and consider any rebuttal evidence prior to the time the order takes effect. *See Solid State Circuits*, 812 F.2d at 391; *cf.* Pet. App. 14 (misstating Petitioner's position as seeking "to inval-

(continued...)

ly responsible party who brings a reimbursement action be afforded a judicial hearing with respect to its alleged liability under CERCLA § 107(a).[18]

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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[17] (...continued)
idate the limitations that section [113(h)] places" on pre-enforcement *judicial* review of § 106(a) orders).

[18] Due process also mandates that a post-deprivation hearing be "prompt." *See Doehr*, 501 U.S. at 22 (plurality); *Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 303 (1981). At least in this case, there was nothing prompt about the procedures available to Petitioner for pursuing a reimbursement action.

APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94-2005, 94-2006, 94-2081

EMPLOYERS INSURANCE OF WAUSAU, a mutual company,
Plaintiff-Appellant,

v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 91 C 4254, 93 C 1366—**Marvin E. Aspen**, *Judge.*

ARGUED JANUARY 4, 1995—DECIDED APRIL 12, 1995

Before POSNER, *Chief Judge*, CUDAHY, *Circuit Judge*, and GRANT, *District Judge.**

POSNER, *Chief Judge.* We have consolidated the appeals in two intimately related cases that arise under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.* The Act, also known (in its current, amended form) as the Superfund law, requires that sites contaminated by toxic wastes be cleaned up by or at the expense of

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* Hon. Robert A. Grant of the Northern District of Indiana.

the persons responsible for the contamination. In one of the cases, Employers Insurance of Wausau, an insurance company that the EPA had ordered to clean up a contaminated site, sued the President of the United States, invoking a 1986 amendment to the Superfund law that provides that "any person who receives and complies with the terms of any order" issued by the EPA to clean up a contaminated site may "after completion of the required action" petition the President for reimbursement of "the reasonable costs of such action"—"response costs," as they are called—and if the petition is turned down may, within sixty days, sue the President in federal district court. §§ 9606(b)(2)(A), (B). The petitioner can obtain judicial relief either by proving by a preponderance of the evidence that it is not liable for response costs (and that the costs it incurred for which it seeks reimbursement were not excessive), § 9606(b)(2)(C), or that the particular response action ordered was arbitrary and capricious, or otherwise unlawful. § 9606(b)(2)(D). The district judge dismissed the suit on the ground that Employers Insurance had failed to complete the clean-up ordered by the EPA. *Employers Ins. of Wausau v. Clinton*, 848 F. Supp. 1359 (N.D. Ill. 1994).

In the other suit, Employers Insurance sued the Administrator of the EPA, to whom the President has delegated the task of responding to petitions for reimbursement, contending primarily that the statutory procedures for challenging clean-up orders are constitutionally inadequate. This suit was filed under 28 U.S.C. § 1331 as a "nonstatutory" review proceeding (of which more later), an accepted method of challenging the procedures used by an agency. *Marozsan v. United States*, 852 F.2d 1469, 1474 (7th Cir. 1988) (en banc). The district judge thought the statutory procedures adequate, rejected the plaintiff's other contentions, and dismissed the suit. *Employers Ins. of Wausau v. Browner*, 848 F. Supp. 1369 (N.D. Ill. 1994). The constitutional challenge is baseless; as we shall see, the remedies that the Superfund law creates against invalid clean-up orders fully satisfy the requirements of due

process. Between them, the two suits (and a third, whose dismissal we affirmed in *Employers Ins. of Wausau v. United States*, 27 F.2d 245 (7th Cir. 1994)) fire what we are constrained to describe as a noisy and largely incomprehensible broadside of charges the majority of which lack, at least so far as we are able to understand them, sufficient merit to warrant discussion.

How did it come about that an *insurance* company was ordered to clean up contaminated land? Employers Insurance had issued a fire insurance policy to the occupant of a building in Michigan. The building caught fire and several electrical transformers were damaged. In a settlement with its insured, Employers Insurance agreed to have certain oils and other fluids drained from the transformers and removed from the insured's premises. According to the EPA—Employers Insurance denies this—the insurance company arranged for the transportation of some seven hundred gallons of these fluids to an oil recycling facility elsewhere in Michigan. Shortly afterward, the facility was found to be contaminated with PCBs (polychlorinated biphenyls) and VOCs (volatile organic compounds), and the PCB contamination was traced to the fluids that had come from the transformers. The EPA designated Employers Insurance as a potentially responsible party within the meaning of the Act—responsible, that is, for the contamination and hence for cleaning it up—and it ordered the insurance company, along with several other alleged contributors to the contamination of the recycling facility, to participate in the clean-up. After initial resistance, Employers Insurance agreed to participate, and it submitted a plan, which the EPA approved, detailing its participation. Neither the order that the EPA issued, nor the plan of compliance that Employers Insurance submitted, is limited in so many words to the elimination of the PCB contamination. But after Employers Insurance finished that part of the clean-up, it stopped work, claiming that it was not responsible for, and therefore would not clean up, any contamination not caused by PCBs. It petitioned the EPA (nominally the President) for reimburse-

ment of the costs that it had incurred in the clean-up—an amount in excess of $2 million. The EPA turned the insurance company down (precipitating these two suits) on the ground that the company had not completed the job.

Employers Insurance claims that it is not responsible for *any* of the contamination at the recycling facility, not even the PCB contamination, because it had not, as the EPA thought it had, arranged for the transportation of the noxious fluids, which would have made it a responsible party. § 9607(a)(3); *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993). It also denies that its petition for reimbursement was premature; it *had*, it contends, completed the clean-up that it was ordered to do; and it argues that it is entitled to the independent judgment of the district court on whether or not this is so. The EPA concedes that if the insurance company did not arrange for the transportation of the fluids, the company is entitled to full reimbursement—but not until it complies fully with the clean-up order. And, the agency argues further, its determination that the company did not comply fully with the order may be set aside by a court only if that determination is found to be unreasonable ("arbitrary and capricious") in a separate judicial proceeding—not in a reimbursement proceeding, which the agency insists is premature.

After Employers Insurance abandoned the clean-up, the EPA stepped in and arranged for the completion of the job at a cost of several hundred thousand dollars. The agency has not yet tried to recover this expense or any part of it from Employers Insurance. Indeed, there is no reason to think the company *was* responsible for any of the contamination that it refused to clean up. And it is only responsible parties who are required by the Superfund law to pay the costs of cleaning up contaminated sites. The concern of Employers Insurance is not with the money that the EPA spent to complete the clean-up and might conceivably though improbably seek to recover from the company, but with the $2 million that the company spent and is unable to get reimbursed because it did not complete the job.

Without the provision authorizing suits for reimbursement of response costs, a person potentially responsible for toxic-waste pollution who was served with a clean-up order would have just two choices: comply with the order, or refuse to comply, in which event the EPA could either seek a mandatory injunction against the refuser, § 9606(a), or hire someone to clean up the polluted site at the EPA's expense and then seek to recover that expense by a suit against the person it had ordered to do the clean-up. § 9613(h)(1). The defendant would have an opportunity in that suit to put the EPA to its proof that the Superfund law really did require the defendant to clean up the site. *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 141-43 (3d Cir. 1994). But it could not challenge the order in advance of having to comply; that route is, as we shall see, closed. Its choice would be to comply or to run the risk of being found to have violated a valid order. This would be a hard choice because there are heavy sanctions for disobeying a valid clean-up order, including large civil fines and treble damages. §§ 9606(b)(1), 9607(c)(3). We stress "valid"; it is of course a good defense to a suit to collect these amercements that the order is invalid. Even if it is valid, the district court in which sanctions are sought can abate them in whole or in part if persuaded that the party had a reasonable though erroneous basis for believing that the clean-up order was invalid. So at least *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 391-92 (8th Cir. 1987), interpreted the defense to treble-damages liability for those who have "sufficient cause" to disobey such an order. § 9607(c)(3). Still, there is a risk that the court will not find that the party acted reasonably, and this risk places pressure on the party to comply even if it has serious doubts whether the order is valid. *Solid State Circuits, Inc. v. EPA*, *supra*, 812 F.2d at 388-89. For if it loses it may end up bearing much more than just the response costs for which the EPA sued.

The provision for reimbursement trims the horns of this dilemma by offering a party served with a clean-up order a third way. *Id.* at 389 n. 9; *Dico, Inc. v. Diamond*, 35

F.3d 348, 349 (8th Cir. 1994). It need not disobey the order and risk heavy sanctions. It need not obey and swallow the heavy costs of compliance. It can obey and then when it has completed the clean-up required by the order sue for the return of its expenses on the ground that it was not a responsible party within the meaning of the statute after all.

But what happens when, as in the present case, a party takes what we are calling the third way but does not complete the clean-up? Completion of the action required by the EPA is an express statutory condition for seeking reimbursement. Does this mean that if for reasons utterly beyond a party's control it fails to complete the clean-up ordered by the agency it forfeits all right to seek reimbursement for expenses that it incurred, even if it turns out that it was never liable under the Superfund law? And even if it turns out, as here, that the clean-up *has* been completed, albeit by someone else? Cf. *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244-45 (7th Cir. 1991). That is the EPA's position. Its lawyer told us at argument that, should the agency unreasonably refuse to acknowledge the completion of the clean-up, this would be final agency action which, because it harms the party by (in the EPA's view) blocking the party's right to seek reimbursement yet is not subject to a special statutory procedure prescribing the method of judicial review, is judicially reviewable by means of a suit for declaratory judgment brought in federal district court. Reviewable, that is, by the so-called "nonstatutory review" route, the catch-all remedy for persons aggrieved by final agency action for which no statute specifies a path of judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Maxon Marine, Inc. v. Director, Office of Workers' Compensation Programs*, 39 F.3d 144, 146 (7th Cir. 1994). But it would not be reviewable, in the EPA's view, by means of a suit for reimbursement.

We may assume without having to decide that the agency's refusal to acknowledge the completion of the clean-up is reviewable by the nonstatutory-review route; for

while the Superfund law prescribes and explicitly makes exclusive the routes for obtaining judicial review of clean-up orders, § 9613(h), the agency action that we are discussing—a refusal to acknowledge compliance with such an order—is not itself a clean-up order, not quite anyway. Even so, we do not see why such an action could not also be reviewed in a suit for reimbursement. If the party ordered to clean up a contaminated site claims to have completed the work, he has a claim for reimbursement, the reimbursement provision being available to "any person who receives and complies with the terms of any" Superfund clean-up order. § 9606(b)(2)(A). If the EPA turns down the claim on the ground that the clean-up has not been completed (or if completed, not completed by the party ordered to complete it, and therefore the agency's order was not complied with), the party has a right to sue and the agency can defend by showing that the clean-up has not been completed and thus that a condition of maintaining such a suit has not been fulfilled. The district court will adjudicate this ground for dismissal exactly as it would do in a separate proceeding to challenge the agency's refusal to acknowledge the completion of the clean-up. The only difference—because in a suit for reimbursement, as in the ordinary nonstatutory-review proceeding, judicial review is confined to the record compiled in the administrative proceeding, § 9613(j)(1); *First National Bank v. Comptroller of Currency*, 956 F.2d 1360, 1362 (7th Cir. 1992)—will be the caption: the suit will be against the Administrator of the EPA rather than against the President—a distinction without a difference, because the President has delegated his authority under the reimbursement provision to the EPA. Ordinarily the refusal to acknowledge completion of the clean-up and the denial of the petition for reimbursement (the denial that the party has sixty days to challenge by bringing a suit for reimbursement) will be contained in the same order; they were here.

A more troublesome case is where the agency takes steps to postpone completion, making it impossible for the

party to argue that it has completed the action required of it by the agency. Employers Insurance argues that it complied fully with the clean-up order, which it interprets as being limited to PCB contamination, but that when it finished the EPA told it to do more. Like the miller's daughter in "Rumpelstiltskin," the company worries that if it did the more the EPA would find something else for it to do, thus postponing indefinitely the time when it could obtain reimbursement. The EPA's response (at oral argument, so possibly ill-considered) is that the party can challenge each of the successive orders in a nonstatutory review proceeding. We are surprised by this response. The successive orders would be clean-up orders, and, with exceptions not material to this case, the Superfund law allows these to be challenged only in proceedings by the agency to enforce the order (either by injunction or by a suit to recover the expense of the clean-up or to impose penalties for noncompliance with the clean-up order) or proceedings by the allegedly responsible person to seek reimbursement of the costs incurred in complying with the order. §§ 9613(h)(1)-(3).

Even if a nonstatutory review proceeding were possible, the party's right to reimbursement could (in principle anyway) still be delayed indefinitely, each successfully challenged order being succeeded by another order. That cannot have been the intention of the statute's draftsmen, as we can show by attending carefully to the statutory language. The right of reimbursement extends to "any person who receives and complies with the terms of [any order]," and ripens into a right to petition and to sue "after completion of the required action." § 9606(b)(2)(A). Obviously "required" means "required by the order." Once a party completes whatever action is required by the terms of any order, it can seek reimbursement for the costs of *that* action. The fact that the agency issues another order (which the party is free to ignore if it is willing to run the risk of being made the defendant in an enforcement action) does not diminish the party's rights to challenge the previous order.

The EPA does not acknowledge having issued a second order, an order that Employers Insurance clean up contamination unrelated to PCBs. It claims that the broader scope was implicit in the original order. The dispute is thus over the interpretation of the order rather than over the agency's right to issue successive orders and deny reimbursement until the last one (if there is a last one) is complied with fully. If the EPA is wrong about the meaning of the original order, this means that the order has been complied with fully—the action required by it completed—and Employers Insurance is entitled to proceed with its suit for reimbursement. The interpretive question, like the question whether a party has completed whatever action the agency wanted him to take, is one that the district court can decide in the reimbursement suit—with what weight given to the agency's view of the matter we shall consider shortly.

The most difficult case is where the party cannot complete the required action for reasons beyond its control. Suppose it simply runs out of money and cannot borrow more. *United States v. Parsons*, 723 F. Supp. 757, 764 (N.D. Ga. 1989), aff'd on other grounds, 936 F.2d 526 (11th Cir. 1991), thought this irrelevant, at least in the special circumstances presented there. We are not sure it should *never* be relevant. Or suppose the cost of the clean-up turns out to be so much higher than anyone reasonably anticipated that the party—who by hypothesis believes himself not to be liable at all, which is why he wants to preserve his right to seek reimbursement for the expenses that he incurs in the clean-up—abandons it half way through. Is he, in either case, forced to write off the costs that he has incurred even though they have reduced the level of contamination and so the costs to the taxpayer of completing the clean-up, and even though he could prove that he was not a responsible party after all? (We set to one side, as inessential to our point, the statutory right of contribution from other sources, if any, of the contamination. § 9613(f)).) An affirmative answer would be harsh. It would also retard the cleaning up of contaminated sites—

one of the objectives of the reimbursement provision. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1324 (7th Cir. 1990); *Dico, Inc. v. Diamond, supra*, 35 F.3d at 349. It would have this effect by inducing more firms to defy clean-up orders and thus put the agency to its proof of statutory responsibility. And it is not compelled in the teeth of reason by the language of the statute. The statute requires compliance with the clean-up order, but compliance need not be a matter of all or nothing. In contract law, substantial compliance with contractual duties is often compliance enough. *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Ins. Co.*, 962 F.2d 628, 636 (7th Cir. 1992); *Jacob & Young's, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921) (Cardozo, J.). The doctrines of impossibility, impracticability, and frustration, which operate as implied terms in contracts, sometimes excuse noncompliance with contractual duty altogether. These familiar defenses, along with a concept of substantial compliance as sufficient when to require more would be unreasonable, could be considered—we need not decide whether they are—implied terms in EPA orders as well. The notion of substantial compliance is not wholly foreign to environmental law. See, e.g., *Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1575-76 (9th Cir. 1994). And remember that one ground for reimbursement is that "the President's decision in selecting the response action ordered was arbitrary and capricious." § 9606(b)(2)(D). If the term "selecting" is allowed to extend forward in time from the initial order, unreasonable insistence on full compliance might be thought a ground for invoking the provision.

Employers Insurance does not argue, however, that it would have been infeasible or unduly burdensome for it to shell out another couple of hundred thousand dollars to complete the clean-up project on which it had already spent in excess of $2 million. It is a large company with thousands of employees, and its annual revenues from premiums exceed $1 billion. It does argue, absurdly as it seems to us, that if it spent $1, or indeed 1¢, on cleaning up the contaminated site, it would be entitled to sue

for reimbursement of that expense and use the suit as a vehicle for obtaining an adjudication of its claim not to be a responsible party. The terms "compliance" and "completed" in the statute cannot be tortured long or hard enough to yield authorization for such a procedure, which is inspired not by anything in the Superfund law but by the provision for refund suits in the Internal Revenue Code—which anyway requires (with immaterial exceptions) payment in full before the suit is filed. *Flora v. United States*, 357 U.S. 63, 75-76 (1958), aff'd on rehearing, 362 U.S. 145 (1960); *Thomas v. United States*, 755 F.2d 728, 729 (9th Cir. 1985). If a party ordered to clean up doesn't want to spend any money, it can refuse to obey the order, wait to be sued, and use that suit as the vehicle for obtaining a determination of its liability. The risk of losing and being made to pay heavy sanctions, a risk mitigated by the defense of sufficient cause as glossed in *Solid State Circuits*, would not violate the Constitution even if there were no reimbursement provision, 812 F.2d at 389-92; it certainly does not violate it given the additional if imperfect remedy which that provision grants. The energy that Employers Insurance devoted in its briefs to attempting to create constitutional qualms about the remedial structure of the Superfund law was misdirected.

The most difficult question presented by *this* case is whether the EPA is authorized to gut the provision for reimbursement by issuing unreasonably, oppressively broad orders. Suppose the order had required Employers Insurance to clean up the recycling facility and, while it was at it, also to clean up the residual contamination in Chernobyl from the nuclear disaster there in 1986. If the insurance company cleaned up just the recycling facility it would not be complying with the order and if the EPA is right it would never be able to seek reimbursement. Our actual case is less extreme. But according to Employers Insurance, the EPA was completely unreasonable in ordering it (if that is what the agency actually *did* in the original order—this is the interpretive question that we mentioned) to clean up not only PCB contamination

for which it would be responsible if it did arrange for the transportation of the fluids from its insured's transformers, but also unrelated contamination at the site, for which it could not possibly bear any responsibility.

We imagine that in a case, illustrated by our Chernobyl hypothetical, in which the clean-up order is so grotesquely broad as plainly to exceed the agency's powers, the party against whom it is directed can comply with the valid part of the order and disregard the rest as void, a nullity, and having complied with the valid part seek reimbursement for the costs of that compliance. An order so completely ultra vires is no order for purposes of deciding whether compliance and completion have been achieved; the valid and the void commands in the order can be separated, and the void discarded. Cf. *DDI Seamless Cylinder International, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1166 (7th Cir. 1994); *United States v. Board of Education*, 11 F.3d 668, 672 (7th Cir. 1993); *Kowalewiocz v. Local 333*, 942 F.2d 285, 289 (4th Cir. 1991). (We have emphasized the need for flexible interpretation of the reimbursement provision before. *North Shore Gas Co. v. EPA*, *supra*, 930 F.2d at 1244-45.)

But that is not our case. The agency takes the position, which may or may not be correct but is not irrational, that a polluter who wants to take advantage of the reimbursement provision may be required to clean up not only his own mess, as it were, but other messes at the same site. The agency's position is at least consistent with the design of the reimbursement provision, which is to defer liability issues until after the clean-up is completed—that is, until the reimbursement proceeding. *Kelley v. EPA*, 15 F.3d 1100, 1106 (D.C. Cir. 1994). The requirement that the reimbursement-seeker clean up the entire site could rationally be believed to contribute to the Act's central objective of promoting the clean-up of contaminated land. And the burden on the party targeted by the order will in most cases be bearable, since he can certainly get reimbursement for the costs that he is asked to incur *not* as a responsible party. The alternative—each polluter at a

site just removing the contaminants for which *he* is responsible—may be inefficient, for the polluters may stumble over each other trying to remove separate pollutants. The pollutants may have been deposited in the same spot by successive waves of polluters, in which case multiple removals would greatly increase total costs. Suppose two passengers in an elevator accidentally drop their keys in the space between the door of the elevator and the door of one of the floors, and the building management instructs one of his employees to go to the bottom of the elevator shaft to retrieve them. Would it make sense for the employee to make two separate trips for the two sets of keys? This is just an analogy, and analogies can lead judges astray. But our only point is that the EPA's desire to have one polluter clean up the entire site is not so flagrantly unreasonable as to entitle the polluter to disregard an order embodying that desire on the ground that the order is so plainly beyond the agency's power that it should be treated as a nullity.

This is not to deny that there would be a problem of the tail wagging the dog if the polluter responsible for only a tiny fraction of the contamination of the site were ordered to clean up the whole thing, perhaps because he had the deepest pocket of all the responsible parties. That might begin to approach our Chernobyl hypothetical. It is not the situation here. Employers Insurance was being asked to spend only about 10 percent more to clean up the non-PCB contamination than it had spent to clean up the PCB contamination for which (if it was the arranger) it was indeed a responsible party.

In the suit that names the Administrator of the EPA as the defendant rather than the President, the insurance company argued in the district court that the agency lacks statutory authority to condition reimbursement on the cleaning up of pollution for which the party ordered is not responsible. *Employers Ins. of Wausau v. Clinton*, *supra*, 848 F. Supp. at 1367. Insofar as the company sought merely to vacate or narrow the order as inconsistent with the authorizing statute, it ran afoul of section

9613(h), the provision that provides the exclusive methods of challenging clean-up orders—and they do not include a suit for injunctive or declaratory relief by the person ordered to perform a clean-up. In any event, the company abandoned its attempt to invalidate the order as overbroad in its opening brief in this court. Its attempt to revive the attempt in its reply brief came too late; the argument had been waived. *Gomez v. Greer*, 896 F.2d 252, 254 (7th Cir. 1990); *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989).

In any event, the main thrust of the suit against the Administrator was not that the order was overbroad; it was that the Superfund law does not give a party ordered to clean up a toxic-waste site an adequate opportunity to challenge the order. The relief sought was to invalidate the limitations that section 9613(h) places on the possible routes for challenging such orders. Such relief could be obtained only in a suit against the Administrator and therefore the suit is not precluded by those limitations; it is, as we suggested at the outset of this opinion, a proper invocation of nonstatutory review. As such it merely had no merit, while insofar as it sought a declaration that the clean-up order was too broad it strayed outside the permissible bounds of such a suit and was barred by the exclusive-remedies provision.

The company is left to argue that it *did* comply with the order and that the agency is mistaken to think otherwise—the agency has misinterpreted its own order. We must consider first what our standard of review is. The relevant section, § 9606(b)(2)(A) ("any person who receives *and complies*. . ."), does not say. The two other provisions potentially involved in this case, (C) and (D), imply different standards of review—plenary in (C) (the "preponderance of evidence" provision), deferential in (D) (the "arbitrary and capricious" provision). *Dico, Inc. v. Diamond*, *supra*, 35 F.3d at 351-52; *Kelley v. EPA*, *supra*, 15 F.3d at 1107. Ordinarily the interpretation of a document (the clean-up order) is considered a question of law,

and appellate review is plenary. *United States v. Administrative Enterprises, Inc.*, 46 F.3d 670, 674 (7th Cir. 1995). But when the document is an order, the court or agency that issued it is, sensibly enough, considered to have special insight into its meaning, so review is deferential. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150-51 (1991); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *In re Weber*, 25 F.3d 413, 416 (7th Cir. 1994); *In re Chicago, Rock Island & Pacific R.R.*, 865 F.2d 807, 810-11 (7th Cir. 1988). An additional consideration in this case is that the question of compliance with the EPA's order depends not only on what the order says and means but also on what the target of the order, the insurance company, did. The agency's opinion turning down the petition for reimbursement is based not only on a purely interpretive determination that the clean-up order was not limited to PCBs but also on a factual determination that the measures which Employers Insurance took to comply with the order did not succeed in eliminating the other contaminants. This raises issues of a purely technical nature on which the agency's determination is entitled to the usual deference that is given to administrative determinations. Cf. *Wagner Seed Co. v. Bush*, 946 F.2d 918, 921 (D.C. Cir. 1991). And the order itself is full of technical terms, and we think the EPA is entitled to some scope in interpreting their meaning as well. It is, to repeat, its own order.

Which makes the case for deference stronger than in *Wagner Seed*, where the majority's conclusion that the EPA's interpretation of the meaning of the statutory language "receives and complies" is entitled to deference drew a spirited dissent from Judge Williams. *Id.* at 925. Stronger too than in *Kelley* and *Dico*, which held that no deference is to be given to the EPA's judgment on whether the person seeking reimbursement is actually liable for response costs. The Superfund law does not give the EPA responsibility for administering the reimbursement provision; it has that responsibility only by virtue of delegation by the President. So it is by no means clear

that it was to have authority to interpret the provision—authority to which *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), would require the courts to defer. But the agency does have statutory authority to issue clean-up orders, and that authority carries with it, we should think, the authority to interpret those orders, and specifically to determine in this case whether its order required the cleaning up of contaminants for which the party ordered had no responsibility.

Employers Insurance points out that the procedure by which the EPA made this determination was not hedged about with the usual safeguards of the adjudicative process, and it argues that the absence of those safeguards justifies a more searching judicial review. The petition for reimbursement was indeed handled informally, by officials who have none of the trappings or protections of judicial officers, cf. *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 789 (2d Cir.) (L. Hand, J.), aff'd, 328 U.S. 275 (1946), and the petitioner, while given ample opportunity (which it took) to submit documents in support of its position, did not have most of the rights of parties to an adjudication, such as the right of cross-examination. The company argues that findings made in so maimed a proceeding should not receive any deference from a court.

But the principles that require judicial deference to administrative findings are not limited to findings made in adjudications. Indeed the broadest deference is given to the findings made in rulemaking proceedings, most of them "informal" in the same sense as the proceeding in this case. See, e.g., *Morales v. Yeutter*, 952 F.2d 954 (7th Cir. 1991). The degree of deference is tied not to the formality or elaborateness of the procedures used by the agency but to the character of the issue in relation to whatever procedures were employed to resolve it. *Packers Trading Co. v. CFTC*, 972 F.2d 144, 145 (7th Cir. 1992); *Central National Bank v. U.S. Dept. of Treasury*, 912 F.2d 897, 904 (7th Cir. 1990). The issue of compliance with the EPA's clean-up order in this case was technical in

character and was addressed in a proceeding that provided for a full exchange of evidence and argument before the agency made its final decision, which it set forth at length in a reasoned, and as it seems to us reasonable (though not necessarily correct), opinion. There is no indication that it is the kind of issue that would have been illuminated by cross-examination.

We conclude that the EPA's finding that Employers Insurance failed to comply with the clean-up order must be upheld unless it is arbitrary or capricious, or in the equivalent terminology of civil suits unless it is clearly erroneous. And it is not. The order by its terms embraces all hazardous substances at the recycling facility, regardless of the particular type of hazardous substance. No doubt the EPA could have given the order a narrower reading, interpolating a limitation to hazardous substances for whose presence at the site Employers Insurance was responsible. But it chose not to do so and we cannot say that it acted unreasonably in refusing. We have already pointed to the reasons why the EPA might want to impose on a source of one pollutant the responsibility for cleaning up the entire site that had been contaminated by that pollutant, even if the site had been contaminated by other pollutants as well. So broad an order might or might not be proper, but, Employers Insurance having waived *that* issue, the only issue left is what the EPA *meant*. We think it meant, or more precisely could reasonably be understood to have meant, that Employers Insurance could not stop its clean-up efforts when the last of the PCBs was removed. Employers Insurance is therefore entitled to no judicial relief.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: April 12, 1995

BEFORE:

Honorable Richard A. Posner, Chief Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable Robert A. Grant, District Judge*

Nos. 94-2005, 94-2006 and 94-2081

EMPLOYERS INSURANCE OF WAUSAU A MUTUAL COMPANY, a mutual insurance corporation,

Plaintiff-Appellant

v.

CAROL M. BROWNER, as Administrator of the United States Environmental Protection Agency, VALDAS V. ADAMKUS, as Regional Administrator of Region V of the United States Environmental Protection Agency, WILLIAM E. MUNO, as Acting Director of the Office of Waste Programs Enforcement of the United States Environmental Protection Agency, et al.,

Defendants-Appellees

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 91 C 4254, 93 C 1366—**Marvin E. Aspen**, *Judge*

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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* The Honorable Robert A. Grant, District Judge for the Northern District of Indiana, is sitting by designation.

EMPLOYERS INSURANCE OF WAUSAU,
a Mutual Company,
a mutual insurance corporation,

Plaintiff,

v.

WILLIAM J. CLINTON,
in his official capacity as President
of the United States, et al.,

Defendants.

No. 93 C 1366

United States District Court
N.D. Illinois, E.D.

March 4, 1994.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

Plaintiff Employers Insurance of Wausau brings this three count action to recover the funds that it expended cleaning up a contaminated oil recycling facility in Romulus, Michigan. Presently before the court is defendants'[1] motions for summary judgment and a protective order. For the reasons set forth below, defendants' motion for

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[1] For the purposes of this opinion, "defendants" shall refer to the United States Environmental Protection Agency and each of the individual defendants (William J. Clinton, Carol Browner, Valdas V. Adamkus, and Bruce M. Diamond) in their official capacities.

summary judgment is granted and motion for a protective order is denied as moot.

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I. Factual Background[2]

On August 24, 1987, fire struck and destroyed a building located in Wyandotte, Michigan. The building's occupant held a policy with plaintiff Employers Insurance of Wausau ("Wausau"), which covered certain perils, including fire, as well as the expense of debris removal resulting from such perils. At the Wyandotte property, this debris included several electrical transformers. In a settlement with the policyholder, Wausau agreed to have certain fluids and oils drained from the transformers and removed from the site. In April, 1989, seven hundred gallons of fluids were removed from the transformers and transported to an oil recycling facility in Romulus, Mich-

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[2] We set forth the facts only as relevant to the issues raised in the present motions. For a more detailed recitation of the facts underlying this action, see this Court's opinion in the related case *Employers Insurance of Wausau v. Bush*, 791 F.Supp. 1314 (N.D.Ill. 1992). We also note at this juncture that defendants failed to submit a statement of material facts as required by Rule 12(m) of the General Rules of the United States District Court for the Northern District of Illinois, which alone would justify our denial of the motion. We will nonetheless consider defendants' motion for several reasons. First, both parties have included extensive factual information in the briefs submitted to this court, making a 12(m) statement essentially duplicative. Second, defendants have indicated that if we were to deny their motion on this ground, they would resubmit the motion with the statement of facts. Our action would therefore simply delay consideration of an otherwise fully briefed and annotated motion. Finally, and perhaps most importantly, Wausau has not objected to defendants' failing in this regard. While we do not condone defendants' failure to comply with the rules of this district, we choose to exercise our discretion and consider this motion.

igan, where the fluids were placed in process tanks for recycling.

The following month, it was discovered that the Romulus facility was contaminated with polychlorinated biphenyls ("PCBs")[3] and volatile organic compounds ("VOCs").[4] The source of the PCB contamination was traced to the oil which had been used in the transformers at the Wyandotte building. On September 11, 1989, the Environmental Protection Agency ("EPA") designated Wausau as a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 *et seq.*,[5] and demanded Wausau's participation in the cleanup. Wausau did not respond, and in November, 1989, the EPA issued a unilateral administrative order directing Wausau and the other involved parties to begin emergency cleanup measures. Wausau strenuously objected, claiming that the EPA's characterization of Wausau's role in the transpor-

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[3] PCBs are a group of chemicals used primarily as coolants in electrical equipment. They are "among the most hazardous man-made chemical substances." *Environmental Transp. Systems, Inc. v. Ensco, Inc.*, 969 F.2d 503, 505 n. 1 (7th Cir. 1992).

[4] VOCs are "vapors emitted from substances such as gasoline and solvents." *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 810 F.Supp. 1331, 1337 (N.D.N.Y. 1993). They include benzene and methylene chloride, and cause adverse human health effects such as cancer. *See Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1211 (D.C.Cir. 1987).

[5] We shall refer to the relevant sections of CERCLA as "CERCLA § ___", using the section employed in the United States Code rather than those used in CERCLA's internal number system.

tation and disposal of the fluids was "materially incorrect," "erroneous, arbitrary and wrongful." After some further wrangling, the EPA filed an administrative action against Wausau under the Toxic Substance Control Act, 15 U.S.C. § 2601 *et seq.*, in an effort to force Wausau to comply with the order. Without admitting any responsibility, Wausau relented and submitted and Emergency Response Action Plan ("ERAP"), setting forth the manner in which it would comply with the order. The EPA approved Wausau's ERAP on February 26, 1990.

The Order itself listed thirty-three findings which detailed the various parties' involvement in the PCB contamination at the Romulus facility. It further specified that "hazardous substances" were present at the site, both due to the PCB contamination and because there existed waste in drums which contained high levels of VOCs. Accordingly, the Order required the potentially responsible parties to:

a. Provide site security and develop and implement a site safety plan.

b. Pump, treat, test, and discharge contaminated water as necessary.

c. Pump and consolidate all contaminated oils and incinerate them off site.

d. Pump out sludges and dispose of them properly.

e. Excavate contaminated soils and dispose of them properly.

f. Pump and treat liquids in the dikes on site.

g. Treat lagoon water and discharge.

h. Sample, characterize, and dispose of drums of waste on site.

i. Conduct post cleanup sampling.

In addition, the order specified requirements for the disposal and treatment of "[a]ll materials containing hazardous substance, pollutants or contaminants removed pursuant to this Order." These requirements of the Order were not limited to PCB-contaminated areas.

The ERAP, drafted by Wausau and approved by the EPA, was expressly designed to "comply with the Order to the extent technically feasible under climatic conditions existing at the Site . . . ." The ERAP is somewhat more PCB specific, setting forth particular requirements with respect to PCB contamination. However, it also contains several broad statements about Wausau's obligations at the Site. These statements include:

> Forty-eight drums are reportedly located at the Site. Immediately following or concurrent with tank sampling, samples will be collected from each drum . . . . The objective of drum sampling and analysis is to ascertain the compatibility of the drum contents and to characterize compatible waste streams to the extent necessary for ultimate treatment and/or disposal. Once compatible waste groups have been identified, representative composite samples will be generated in the laboratory for waste characterization testing.
>
> . . . .
>
> Surface water bodies on Site will be sampled, in accordance with the Sampling and Analysis Plan. Each discrete surface water body will be sampled immediately following completion of tank and drum waste sample collection.
>
> . . . .
>
> Sediment samples will be collected from on and off-Site lagoons, drainage wales and other surface water bodies that are potential receptors of contaminated materials.

. . . .

Immediately following, or concurrent with, sample collection, laboratory chemicals potentially present in the former laboratory building will be inventoried for disposal. When necessary, containers will be sampled for characterization.

. . . .

The Contractor will transfer contaminated oils from the storage tanks to approved hazardous waste liquid tankers. Liquids will be removed from the tanks utilizing a vacuum truck, portable or in-line pumps.

. . . .

Following identification of unique waste streams, compatible drummed wastes will be blended and removed off Site for treatment or disposal in strict accordance with State and Federal regulations. The final disposal mode selected for each waste stream will be based on an assessment of the characterization data and acceptance by approved treatment or disposal facilities. Empty drums will be crushed and disposed of as RCRA hazardous waste bulk solids.

Finally, the ERAP expressly amended the Order to allow Wausau 180 days to complete its cleanup activities.

Following the EPA's approval of the ERAP, Wausau began its cleanup. However, in several telephone calls and letters to the EPA, Wausau indicated that it did not believe that it would be responsible for cleaning up any non-PCB contamination under the Order and the ERAP. In response, the EPA consistently maintained that both the Order and the ERAP were worded broadly and were not limited to PCB contamination, and that Wausau was required to clean up *all* hazardous substances located at the Site. However, Wausau persisted in its interpretation of the Order and ERAP, and claimed that it completed

the prescribed cleanup on January 24, 1991, some 331 days after approval of the ERAP, or 151 days late. At no time did Wausau submit a written request for an extension of time, as required by the Order.

[1] On March 22, 1991, Wausau submitted a petition for reimbursement of its response costs, which exceeded $2,000,000, pursuant to CERCLA § 9606(b)(2)(A). The EPA, however, informed Wausau that it had not completed the cleanup required, and detailed those tasks which remained undone. Wausau submitted a supplemental report in support of its claim that it had fulfilled its obligation at the Site. Disagreeing, the EPA finished the cleanup on October 25, 1991. On June 2, 1992, the EPA issued a preliminary decision denying Wausau's petition for reimbursement based upon Wausau's failure to complete the required cleanup, and invited Wausau to respond. Wausau submitted forty-five pages of comments and hundreds of pages of exhibits on September 14. After reviewing these comments and documents, the EPA, on January 28, 1993, issued its final decision denying Wausau's petition for reimbursement. Wausau then filed the present case, seeking review of the EPA's decision denying its petition for reimbursement, and requesting reimbursement of its cleanup costs.[6]

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[6] Wausau would also have us consider its reimbursement petition on the merits, determining whether Wausau is a liable party, and if so, to what extent. Even if we concluded that the EPA had erred in refusing to consider Wausau's petition, however, we would remand the case to the EPA for consideration of the petition on the merits, as the EPA has not previously considered the merits of Wausau's reimbursement claim, and that determination is initially the province of the EPA. *See, e.g., Camp v. Pitts,* 411 U.S. 138, 142-43, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973).

II. Statutory Background

[2] Enacted in 1980, "CERCLA was designed 'to bring order to the array of partly redundant, partly inadequate federal hazardous substances clean up and compensation laws.' " *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989) (quoting *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985)). The primary purpose of CERCLA is "the prompt cleanup of hazardous waste sites." *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985). To this end, upon a determination that there is an actual or threatened release of a hazardous substance,[7] CERCLA gives the EPA the authority (1) to take direct response action to clean up a site and later seek reimbursement from responsible parties, 42 U.S.C. § 9604(a) (1988), or (2) to require those responsible parties to conduct the cleanup themselves.[8] *Id.* § 9606(a); *see also Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1324 (7th Cir. 1990). In order to "encourage potentially responsible parties to conduct a cleanup expeditiously and postpone litigation about responsibility to a late time," *Bethlehem Steel,* 918 F.2d at 1324, Congress amended CERCLA to give those parties that "receive and comply" with a cleanup order the right to petition the EPA for reimbursement. 42 U.S.C.

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[7] CERCLA's definition of "hazardous substances" is broad, and includes hazardous wastes listed under five other federal environmental statutes, including the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* See CERCLA § 9601(14).

[8] We note that most of the authority granted under CERCLA is explicitly imparted to the President. However, the President has delegated administration of CERCLA to the Administrator of the EPA. *See* Exec. Order No. 12580, 50 Fed.Reg. 2923 (1987), *reprinted in* 42 U.S.C. § 9615 (Supp.1991).

§ 9606(b)(2)(A) (Supp. 1991). To obtain reimbursement, a petitioner must establish (1) "by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of [CERCLA] and that the costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order," *id.* § 9606(b)(2)(C), or (2) "on the administrative record, that the [EPA's] decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." *Id.* § 9606(b)(2)(D). If the EPA refuses to grant all or part of a § 9606(b)(2) petition for reimbursement, "the petitioner may within 30 days of receipt of such refusal file an action . . . in the appropriate United States district court seeking reimbursement." *Id.* § 9606(b)(2)(B).

III. Discussion

[3] The first issue we must consider is whether the EPA's determination that Wausau failed to comply with the Order is properly subject to review by this court, and if so, what the appropriate standard of review is. As noted above, CERCLA § 9606(b)(2) provides the authority for reimbursement actions. That section reads, in relevant part:

> (A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest . . .
>
> (B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate

United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision is selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with the law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

In addition, CERCLA § 9613(j), entitled "Judicial review," provides:

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action

> unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

It is thus apparent that CERCLA provides for judicial review under certain circumstances. That is, a party may obtain review of the EPA's determination regarding its liability pursuant to CERCLA § 9606(b)(2)(C), as well as the proper scope of that liability pursuant to CERCLA §§ 9606(b)(2)(D) and 9613(j). However, there is no explicit provision for review of the EPA's determination that a party did not "comply" with the relevant Order, and is thus not entitled to consideration of its petition on the merits. Indeed, there is nothing in the statute to indicate that the drafters of CERCLA even contemplated that this may be an issue; rather, their sole focus was providing for review of the EPA's ruling on the merits of a reimbursement petition.[9]

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[9] We are equally unable to look to other courts for guidance, as this is apparently a case of first impression. Indeed, the only issue regarding the "receives and complies" language which has arisen to date is its impact on the retroactivity of the reimbursement provision as a whole, which was added in 1986. The EPA has consistently ruled that a party must have both received and complied with the Order after the effective date of the amendments allowing for reimbursement in order to qualify for reimbursement, a position which has been upheld in the federal courts. *See, e.g., Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C.Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1584, 118 L.Ed.2d 304 (1992); *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323 (7th Cir. 1990). In the present action, the EPA relies heavily upon the D.C. Circuit's ruling in *Wagner* that the "interpretation of the 'receives and complies' requirement of [CERCLA § 9606(b)(2)(A)] is the agency's responsibility in the first instance." *Wagner*, 946 F.2d at 923. How-

(continued...)

Of course, the determination that a petitioner has "receive[d] and complied[d]" with an Order is a necessary precursor to the EPA's consideration of a petitioner's liability and the scope of the response action. It is therefore possible to argue that the provisions allowing for review of these issues necessarily encompass the EPA's ruling on whether the petitioner has "complie[d]" with the Order in the first instance. This argument, however, is unconvincing, because though it would provide the authority for judicial review of the compliance issue, it would also offer competing standards of review. That is, in considering whether a petitioner is properly liable for response costs, a reviewing court is to make its decision based upon a preponderance of the evidence standard. CERCLA § 9606(b)(2)(C). *See also Kelley v. EPA*, 15 F.3d 1100, 1106 (D.C.Cir. 1994). On the other hand, a court reviews the scope and reasonableness of the ordered response merely to determine whether the EPA's actions were "arbitrary and capricious." CERCLA §§ 9606(b)(2)(D) & 9613(j). As a result, even if we were to infer the authority for judicial review of the compliance issue, we would be left with no direction as to the appropriate standard of review. Indeed, this quandary is exemplified

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[9] (...continued)
ever, that statement arose in the context of the retroactivity of the provision, a question of statutory interpretation. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), an agency's interpretation of a statute it administers is entitled to considerable deference. We, however, are not faced with a question of statutory interpretation, but rather with the scope of the Order and Wausau's compliance, or lack thereof, with that Order. Accordingly, *Wagner* and *Bethlehem Steel* provide us with little guidance.

by the parties' assertions in the present case. While the EPA maintains that it is entitled to the highly deferential "arbitrary and capricious" standard, Wausau claims we should review the EPA's decision *de novo*. We are unwilling to adopt either approach, at least based upon the provisions of CERCLA. Because we conclude that the statute fails to provide for judicial review in this circumstance, we instead default to the provisions of the Administrative Procedure Act.

[4] The Administrative Procedure Act ("APA") provides for judicial review of agency actions. *See* 5 U.S.C. § 701 *et seq.* Specifically, APA § 704 states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[10] The statute also sets out the proper scope of review:

The reviewing court shall—

. . . . .

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[10] The APA does not apply however, "to the extent the relevant statute 'preclude[s]' judicial review." *Black v. Community Nutrition Inst.*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453, 81 L.Ed.2d 270 (1984) (quoting APA § 701(a)(1)). Admittedly, CERCLA does place restrictions on the availability of judicial review. CERCLA § 9613(h) states that "[n]o Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following . . . ." The section goes on to list five exceptions. This preclusion of judicial review does not preempt the APA in the present circumstance, since we are passing on neither an action selected under APA § 9604 nor an order under § 9606(a). Rather, the limited issue we consider in this action was whether Wausau complied with the relevant order, thus entitling it to consideration of its reimbursement petition. Because CERCLA does not preclude review of this issue, and because it doe snot expressly provide for it, consideration under the APA is appropriate.

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law; [or]

. . . .

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

APA § 706. With respect to the issue of whether Wausau complied with the Order, and was thus entitled to consideration of its reimbursement petition on the merits, we conclude that the appropriate standard of our review is whether the EPA's ruling was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the familiar APA standard of review, or that it failed to meet some statutory, constitutional or procedural requirement. Wausau would apparently prefer we apply the standard set forth in subparagraph (F).[11] However, as the D.C. Circuit has noted:

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[11] We note that, although the EPA challenged Wausau's APA-based claim in its motion for summary judgment, Wausau failed to respond to the EPA's arguments. Indeed, Wausau provides no analysis of the appropriate APA standard of review. Instead, it notes that the issue of *liability* is subject to de novo review, and apparently by extension, concludes that the initial determination of compliance with the Order is likewise subject to de novo review. As discussed further below, we reject Wausau's attempted extension.

> *[D]e novo* review is only allowed under this rule in two limited instances: where the agency action is adjudicatory in nature and the fact finding procedures are inadequate; or where issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action.

Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 285 (D.C.Cir. 1981) (citations omitted); *see also Citizens of Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 91 S. Ct. 814, 823, 28 L.Ed.2d 136 (1971). Wausau can not fit itself into either exception. The only potential argument is that the EPA's fact finding procedures are inadequate. However, in making its decision, the EPA compiled a voluminous administrative record regarding the cleanup activities at the Site. In addition, Wausau was invited to and did respond to the EPA's preliminary decision denying its petition. Indeed, it submitted a forty-five page written response to the decision, accompanied by hundreds of pages of exhibits, all of which were placed in the administrative record. Accordingly, any argument that the fact finding procedures are inadequate is unavailing, and it is therefore clear that this highly intrusive standard of review does not apply. We will therefore apply the more common standard, and consider whether the EPA's conclusion that Wausau failed to comply with the Order was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[12]

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[12] Our conclusion that the "arbitrary and capricious" standard applies is further supported by language in *Wagner Seed Co. v. Bush,* 946 F.2d 918 (D.C. Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S.ct. 1584, 118 L.Ed.2d 304 (1992). There the court stated, albeit in dicta, that it "would be truly bizarre . . . for a court to determine *de novo* [the issue of "whether a party has

(continued...)

[5,6] To determine whether the EPA's decision fails under this standard, we must consider

> whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Overton Park, 401 U.S. at 416, 91 S.Ct. at 824 (citations omitted). The basis for this review is the "whole record or those parts of it cited by a party," i.e., the administrative record compiled and relied upon by the agency. APA § 706. *See also Overton Park*, 401 U.S. at 419-20, 91 S.Ct. at 825-26. In the present case, we can not say that the EPA made a "clear error in judgment" in concluding that Wausau failed to comply with the Order. We are forced to confront essentially two issues in this analysis. First, we must determine whether the EPA properly characterized the scope of the Order and the ERAP, and second, we must determine whether Wausau fully complied with the Order and ERAP so characterized. With respect to the first issue, we find entirely supportable the EPA's conclusion that the Order and ERAP applied to all hazardous wastes, and not just those which evidenced high levels of PCB contamination. As noted above, the Order is worded very broadly, as is the CERCLA definition of hazardous waste. And although the implementing ERAP

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[12] (...continued)
'complied' with the agency's clean-up order"], which may involve both technical and policy questions within the expertise of the agency." *Id.* at 921. Accordingly, we reject Wausau's claim that it is entitled to de novo of this issue.

does prescribe several actions which relate directly and exclusively to PCB contamination, it also includes broad remedial directives in other areas. Furthermore, in extensive post-ERAP approval correspondence with Wausau, the EPA repeatedly articulated that the scope of the Order and ERAP included all hazardous wastes, and not merely those contaminated by PCBs. Accordingly, we conclude that the EPA's interpretation of the breadth of the Order and ERAP was not clear error.

[7] Wausau maintains, however, that the EPA lacks the authority to draft an Order which demands that a party clean up waste for which that party is not even potentially responsible. Specifically, Wausau argues that

> [t]he Order can not be interpreted to have included uncontaminated oils, soils, materials and structures, or to have required Plaintiff to perform activities not identified in the Order or not associated with Plaintiff's purported liability at the Site. To the extent that the Agency is interpreting contamination beyond the contaminants of concern specifically identified in the Order, *or contaminants not associated with Plaintiff's purported liability*, that interpretation is arbitrary and capricious and not otherwise in accordance with the law.

Plaintiff's Response to Defendant's Motion for Summary Judgment at 5-6 (emphasis in original). We disagree. Of course, only a party who is actually liable for contamination can ultimately be made to pay for the clean up of that contamination. However, CERCLA evidences Congress' decision to have hazardous waste sites cleaned as quickly and thoroughly as possible, and defer issues of liability until after the remedial actions have been completed. *See J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985) (purpose of CERCLA is "prompt cleanup

of hazardous waste sites"). As a result, it is not inconsistent with the broad goals of the statute to require a party who is potentially responsible for some contamination at a particular site to clean up the entire site, and then petition the government for reimbursement of those costs attributable to any portion of the contamination for which the party was not actually responsible. Indeed, as discussed above, the reimbursement provisions of CERCLA clearly contemplate the very situation we face here. A party is entitled to reimbursement if that party is not liable, or, even if the party is liable, if the response action ordered was arbitrary and capricious or otherwise not in accordance with law. CERCLA §§ 9606(b)(2)(C) and (D). These provisions provide clear support for the EPA's contention that it may require a party to submit to an Order that goes beyond that party's potential responsibility, since that party, if it completes the required cleanup, will be reimbursed to the extent the Order required cleanup beyond the scope of the party's actual legal obligations.[13] Wausau may not like the remedial scheme set up by CERCLA, but we are bound by the decision that Congress has made.[14] We

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[13] *See, e.g., North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991) ("If the court found that the order was arbitrary and capricious, it could require the EPA to reimburse [the petitioner] for the added expenses caused by the order, or by the order's arbitrary and capricious component if the order was not arbitrary and capricious as a whole.") (citing CERCLA § 9606(b)(2)(D)).

[14] Congress' authority is, of course, limited by the Constitution. However, Wausau has challenged the constitutionality of the relevant provisions of CERCLA in the related action *Employers Insurance of Wausau v. Browner*, 848 F.Supp. 1369 (N.D. Ill. 1994), and we shall therefore consider Wausau's constitutional objections in the context of that case.

therefore conclude that the EPA's interpretation of CERCLA and the scope of the Order and ERAP was legitimate.

We now turn to consideration of Wausau's actual activities at the Site. The EPA concluded that Wausau failed to complete a number of activities which were required by the Order and ERAP. Although Wausau disputes some of the EPA's claims in this regard, it is clear from Wausau's own Response Action Report ("RAR"), filed after its putative completion of the cleanup, that certain hazardous substances and wastes remained on the Site. For example, Table 5 of the RAR, entitled "SUMMARY OF NON-PCB CONTAMINATED TANKED MATERIALS CURRENTLY REMAINING ON SITE," lists over 10,000 gallons of used oil, water, and sludge which Wausau left in tanks at the Site. Although these materials did not contain high levels of PCBs, such materials contain other CERCLA-listed hazardous substances. *See, e.g. United States v. Western Processing Co.*, 761 F.Supp. 713, 721 (W.D. Wash. 1991); *Washington v. Time Oil Co.*, 687 F.Supp. 529, 532 (W.D. Wash. 1988). *See also Cose v. Getty Oil Co.*, 4 F.3d 700, 706 (9th Cir. 1993). Both the Order, at page 8, and the ERAP, at pages 19-20, require removal of contaminated oils. Likewise, Wausau does not dispute that it left fourteen drums of sulfuric acid at the Site, although the Order, at page 8, and the ERAP, at page 20, require removal of drummed wastes. Because of its corrosive properties, sulfuric acid qualifies as a hazardous waste under CERCLA. *See* CERCLA § 9601(14). Based upon these undisputed facts, it is apparent that

Wausau failed to comply with the Order and ERAP.[15] Because compliance with the Order is, under CERCLA, a prerequisite to entitlement to reimbursement, Wausau is precluded from seeking reimbursement from the Fund. Accordingly, defendants' motion for summary judgment is granted.[16]

IV. Conclusion

For the reasons set forth above, defendants' motion for summary judgment is granted and defendants' motion for a protective order is denied as moot. It is so ordered.

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[15] We also note that Wausau did not timely complete its activities at the Site. Although the Order was amended to allow Wausau to complete the cleanup 180 days after approval of the ERAP, Wausau did not finish its activities until 331 days after approval. In addition, it never filed a written request for an extension, in violation of the Order. This delay provides additional support for the EPA's conclusion that Wausau failed to "comply" with the Order.

[16] Defendants have also moved for a protective order precluding discovery in the present action, claiming that our review should be based solely upon the administrative record. As noted above, we agree, and based upon that review grant summary judgment to defendants. Accordingly, the motion for a protective order is now moot.

EMPLOYERS INSURANCE OF WAUSAU,
a mutual company,
a mutual insurance corporation,

Plaintiff,

v.

CAROL M. BROWNER, as Administrator of the United States Environmental Protection Agency; Valdas V. Adamkus, as Regional Administrator of Region V of the United States Environmental Protection Agency; William E. Muno, as Acting Director or the Office of Waste Programs Enforcement of the United States Environmental Protection Agency; and The United States Environmental Protection Agency, and United States of America,

Defendants.

No. 91 C 4254.

United States District Court,
N.D. Illinois, E.D.

April 27, 1994.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

Plaintiff Employers Insurance of Wausau brings this four count action against the United States of America, the United States Environmental Protection Agency, and

various Environmental Protection Agency officials.[1] Presently before the court is defendants' motion of judgment on the pleadings. For the reasons set forth below, the federal defendants' motion is granted.

I. Judgment on the Pleadings Standard[2]

A party is entitled to judgment on the pleadings only if that party "clearly establishes that no material issue of fact remains to be resolved and that he or she is entitled to judgment as a matter of law." *National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 358 (7th Cir. 1987) (citing *Flora v. Home Fed. Savings & Loan Ass'n*, 685 F.2d 209, 211 (7th Cir. 1982)). We will consider only matters presented in the pleadings, and will view the facts in the light most favorable to the non-moving party. *National Fidelity*, 811 F.2d at 358 (citing *Republic Steel Corp. v. Pa. Eng'g Corp.*, 785 F.2d 174, 177 n. 2 (7th Cir. 1986)).

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[1] Specifically, the suit names Carol M. Browner, as Administrator of the EPA, Valdas V. Adamkus, as Regional Administrator of Region V of the EPA, and William E. Muno, as Acting Director of the Office of Waste Programs Enforcement of the EPA.

[2] Wausau has asked that we convert defendants' motion for judgment on the pleadings to a motion for summary judgment pursuant to Fed. R. Civ. P. 12(c). *See, e.g. Republic Steel Corp. v. Pa. Eng'g Corp.*, 785 F.2d 174, 177-78 (7th Cir. 1986). However, the additional materials submitted by Wausau serve only to substantiate allegations made in Wausau's third amended complaint, which we view in the light most favorable to Wausau in any event. Furthermore, we are faced with primarily legal, rather than factual, issues in the present action. Accordingly, we decline to exercise our discretion to convert this motion to one for summary judgment.

II. Factual Background[3]

On August 24, 1987, fire struck and destroyed a building located in Wyandotte, Michigan. The building's occupant held a policy with plaintiff Employers Insurance of Wausau ("Wausau"), which covered certain perils, including fire, as well as the expense of debris removal resulting from such perils. At the Wyandotte property, this debris included several electrical transformers. In a settlement with the policyholder, Wausau agreed to have certain fluids and oils drained from the transformers and removed from the site. In April, 1989, seven hundred gallons of fluids were removed from the transformers and transported to an oil recycling facility in Romulus, Michigan, where the fluids were placed in process tanks for recycling.

The following month, it was discovered that the Romulus facility was contaminated with polychlorinated biphenyls ("PCBs")[4] and volatile organic compounds ("VOCs").[5] The source of the PCB contamination was

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[3] The factual background is more fully set forth in our recent opinion in the related case *Employers Ins. of Wausau v. Clinton*, 848 F.Supp. 1359 (N.D. Ill. 1994), as well as in our earlier opinion in the present action. *See Employers Ins. of Wausau v. Bush*, 791 F.Supp. 1314 (N.D. Ill. 1992). We shall therefore limit our recitation of the facts to those relevant to the current motion.

[4] PCBs are a group of chemicals used primarily as coolants in electrical equipment. They are "among the most hazardous man-made chemical substances." *Environmental Transp. Systems, Inc. v. ENSCO, Inc.*, 969 F.2d 503, 505 n.1 (7th Cir. 1992).

[5] VOCs are "vapors emitted from substances such as gasoline and solvents." *Motor Vehicle Mfrs. Ass'n. v. New York State*

(continued...)

traced to the oil which had been used in the transformers at the Wyandotte building. On September 11, 1989, the Environmental Protection Agency ("EPA") designated Wausau as a potentially responsible party under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 *et seq.*,[6] and demanded Wausau's participation in the cleanup. Wausau did not respond, and in November, 1989, the EPA issued a unilateral administrative order directing Wausau and the other involved parties to begin emergency cleanup measures. Wausau strenuously objected, claiming that the EPA's characterization of Wausau's role in the transportation and disposal of the fluids was "materially incorrect," "erroneous, arbitrary and wrongful." After some further wrangling, the EPA filed an administrative action against Wausau under the Toxic Substance Control Act, 15 U.S.C. § 2601 *et seq.*, in an effort to force Wausau to comply with the order. Without admitting any responsibility, Wausau relented and submitted an Emergency Response Action Plan ("ERAP"), setting forth the manner in which it would comply with the order. The EPA approved Wausau's ERAP on February 26, 1990.

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[5] (...continued)
Dep't of Envtl. Conservation, 810 F. Supp. 1331, 1337 (N.D.N.Y. 1993). They include benzene and methylene chloride, and cause adverse human health effects such as cancer. *See Natural Resources Defense Council v. EPA*, 824 F.2d 1211 (D.C. Cir. 1987).

[6] We shall refer to the relevant sections of CERCLA as "CERCLA § ___," using the section numbers employed in the United States Code rather than those used in CERCLA's internal numbering system.

The Order itself listed thirty-three findings which detailed the various parties' involvement in the PCB contamination at the Romulus facility. It further specified that "hazardous substances" were present at the site, both due to the PCB contamination and because there existed waste in drums which contained high levels of VOCs. The order therefore called for the disposal and treatment of "[a]ll materials containing hazardous substance, pollutants or contaminants removed pursuant to this Order." These requirements of the Order were not limited to PCB-contaminated areas.

The ERAP, drafted by Wausau and approved by the EPA, was expressly designed to "comply with the Order to the extent technically feasible under climatic conditions existing at the Site. . . ." The ERAP is somewhat more PCB specific, setting forth particular requirements with respect to PCB contamination. However, it also contains several broad statements about Wausau's obligations at the Site. Finally, the ERAP expressly amended the Order to allow Wausau 180 days to complete its cleanup activities.

Following the EPA's approval of the ERAP, Wausau began its cleanup. However, in several telephone calls and letters to the EPA, Wausau indicated that it did not believe that it would be responsible for cleaning up any non-PCB contamination under the Order and the ERAP. In response, the EPA consistently maintained that both the Order and the ERAP were worded broadly and were not limited to PCB contamination, and that Wausau was required to clean up *all* hazardous substances located at the Site. However, Wausau persisted in its interpretation of the Order and ERAP, and claimed that it completed the prescribed cleanup on January 24, 1991, some 331

days after approval of the ERAP, or 151 days late. At no time did Wausau submit a written request for an extension of time, as required by the Order.

On March 22, 1991, Wausau filed a petition for reimbursement of reasonable response costs pursuant to § 9606(b)(2) of CERCLA. The EPA responded to Wausau's request by letter dated June 10, 1991, refusing to grant relief on the grounds that Wausau had not fully complied with the requirements of the § 9606 order and the ERAP. Wausau disputed the EPA's assessment of the work performed, claiming that the cleanup measures listed by the EPA were either complied with or not required by the order or the ERAP. To support its position, Wausau inspected the CIW site on June 24, 1991, and submitted "Post Response Action Compliance Comments" to the EPA on July 9, 1991. Nonetheless, the EPA hired an additional contractor to conduct further cleanup measures at the CIW site. The contractor completed the actions required by the administrative order on October 25, 1991.

Wausau brought the instant action on July 9, 1991. Following a motion to dismiss, which we granted in part and denied in part, *see Employers Ins. of Wausau v. Bush*, 791 F.Supp. 1314 (N.D. Ill. 1992), four counts remained, asserting violations of procedural due process, substantive due process, and equal protection, along with a claim under the Administrative Procedure Act.[7] The defendants have now moved for judgment on the pleadings on these remaining claims.

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[7] In a related action, Wausau challenged the EPA's denial of its petition for reimbursement. *See Employers Ins. of Wausau v. Clinton*, 848 F.Supp. 1359 (N.D. Ill. 1994) (granting defendants' motion for summary judgment).

III. Statutory Background

Enacted in 1980, "CERCLA was designed 'to bring order to the array of partly redundant, partly inadequate federal hazardous substances clean up and compensation laws.' " *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989) (quoting *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985)). The primary purpose of CERCLA is "the prompt cleanup of hazardous waste sites." *J.V. Peters & Co. v. Administrator, Environmental Protection Agency*, 767 F.2d 263, 264 (6th Cir. 1985). To this end, upon a determination that there is an actual or threatened release of a hazardous substance,[8] CERCLA gives the EPA the authority (1) to take direct response action to clean up a site and later seek reimbursement from responsible parties, CERCLA § 9604(a), or (2) to require those responsible parties to conduct the cleanup themselves.[9] CERCLA § 9606(a); *see also Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1324 (7th Cir. 1990). In the event the EPA chooses the latter course, it first identifies potentially responsible parties ("PRPs"), and requests voluntary help in the clean-up process. If the EPA receives no response, it issues an administrative order naming all of the PRPs and demanding their immediate assistance. At this point, a PRP has

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[8] CERCLA's definition of "hazardous substances" is broad, and includes hazardous wastes listed under five other federal environmental statutes, including the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* *See* CERCLA § 9601(14).

[9] We note that most of the authority granted under CERCLA is explicitly imparted to the President. However, the President has delegated the administration of CERCLA to the Administrator of the EPA. *See* Exec. Order No. 12,580, 50 Fed. Reg. 2923 (1987), *reprinted in* 42 U.S.C. § 9615 note (Supp. 1991).

two alternatives. It may ignore the administrative order and wait for the EPA to bring an enforcement action against it. In the event the EPA brings such an action, the PRP is entitled to a judicial hearing prior to its forced involvement in the clean-up. CERCLA § 9613(h). However, the PRP is subject to significant, albeit discretionary, fines in the event it is determined that its failure to comply with the order was without "sufficient cause." CERCLA § 9606(b)(1).

On the other hand, the PRP may proceed with the clean-up, and subsequently petition the EPA for reimbursement of the funds it expended. CERCLA § 9606(b) This alternative was added as part of the SARA amendments of 1986 in order to "encourage potentially responsible parties to conduct a clean-up expeditiously and postpone litigation about responsibility to a later time." *Bethlehem Steel*, 918 F.2d at 1324. Specifically, CERCLA provides that those parties that "receive and comply" with a cleanup order are entitled to petition the EPA for reimbursement. CERCLA § 9606(b)(2)(A). To obtain reimbursement, a petitioner must establish (1) "by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of [CERCLA] and that the costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order," CERCLA § 9606 (b)(2)(C), or (2) "on the administrative record, that the [EPA's] decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." CERCLA § 9606(b)(2)(D). If the EPA refuses to grant all or part of a § 9606(b)(2) petition for reimbursement, "the petitioner may within 30 days of receipt of such refusal file an action . . . in the appropriate United States district court seeking reimbursement." CERCLA § 9606(b)(2)(B).

IV. Discussion

A. Procedural Due Process

Wausau maintains that CERCLA is constitutionally infirm, both as applied and on its face. Specifically, Wausau claims that the remedial scheme set up by CERCLA § 9606(b) deprived it of procedural due process, at both the pre-enforcement and post-enforcement states. We shall consider each of Wausau's contentions in turn.

1. Pre-Enforcement Review

[1] Wausau claims that it did not have the opportunity for a meaningful hearing prior to being compelled to participate in the clean-up. As the Supreme Court noted in *Matthews v. Eldridge,* 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L.Ed.2d 18 (1976), due process entitles an individual to be heard "at a meaningful time and in a meaningful manner." Three factors are generally to be considered in determining whether this due process standard has been satisfied: (1) the significance of the private interest that is to be affected; (2) the risk of erroneous deprivation of such interest, and the likely value of any additional procedural safeguards; and (3) the government's interest in the existing procedural framework, including assessment of the burdens which would accompany further procedural safeguards. *Id.* at 335, 96 S. Ct. at 903.

[2] As defendants point out, the provision for pre-enforcement review under CERCLA has been repeatedly challenged, and courts have uniformly upheld its constitutionality. *See e.g., Barmet Aluminum Corp. v. Reilly,* 927 F.2d 289, 295-96 (6th Cir. 1991); *Dickerson v. EPA,* 834 F.2d 974, 978 n. 7 (11th Cir. 1987); *Solid State Cir-*

cuits, Inc. v. EPA, 812 F.2d 383, 390 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315-16 (2d Cir. 1986). We see no reason to disagree with the well-reasoned conclusions of those courts. An assessment of the factors listed in *Eldridge* clearly supports our holding. We first consider the private interest at stake, as the process due in a given circumstance depends largely upon the significance of the interest involved. Here, the only possible deprivation under CERCLA is purely economic. That is, CERCLA orders generally require that a PRP expend the funds necessary to prevent or clean-up the release of hazardous wastes. It is well established that, unlike deprivations of life or liberty, monetary deprivations do not demand the strictest level of due process. *See Eldridge*, 424 U.S. at 333, 96 S. Ct. at 902; *Dickerson*, 834 F.2d at 978 n. 7. Accordingly, this factor cuts in favor of CERCLA's constitutionality.

The same is true of the second factor listed above. As noted, a PRP which believes that an order issued by the EPA is erroneous can refuse to comply with that order. In order to compel compliance with the order and to collect penalties for failure to comply, the EPA is required to bring an enforcement action pursuant to CERCLA § 9606(b)(1). At this stage, the PRP is entitled to judicial review of the order, including the question of liability. *See* CERCLA § 9613(h)(2); *Gary Steel Supply Co. v. Reagan*, 711 F.Supp. 471, 475 (N.D. Ill. 1989). Accordingly, a PRP is fully entitled to obtain judicial review of the EPA's order prior to being deprived of its

property.[10] We also observe that this opportunity for review is not compromised by the potential imposition of penalties at the pre-enforcement stage. First, as defendants note, a good faith defense to the administrative order precludes the application of the penalty provision under CERCLA § 9606(b)(1). Furthermore, CERCLA § 9606(b)(1) expressly makes the imposition of penalties discretionary with the court. As a result, the presence of the penalty provision does not affect the constitutionality of the procedures offered in CERCLA for pre-enforcement review. *See Wagner Seed Co.*, 800 F.2d at 316 ("[I]t is plain that there is no constitutional violation if the imposition of penalties is subject to judicial discretion and the enforcement provisions contain a good faith exception.").

In addition, further procedures would provide limited additional safeguards. The "sufficient cause" basis for non-compliance provides PRPs who believe an order erroneous with sufficient incentive to refuse to comply

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[10] Wausau's convoluted argument to the contrary is unconvincing. Wausau notes that the EPA is vested with the authority to bring an enforcement action under CERCLA §§ 9606(b)(1) and 9613(h)(2). Because the decision to bring such an action is solely within the discretion of the EPA, Wausau argues, a PRP would not be able to obtain review of an order if the EPA refused to bring an enforcement action. While this is certainly true, it is also irrelevant. That is, the only means that the EPA has of forcing a PRP to comply with an order, or of collecting penalties for failure to comply, is through an enforcement action. As a result, no deprivation can possibly occur until the EPA brings such an action, at which time the PRP is also entitled to judicial review. Accordingly, the lack of a hearing prior the bringing of an enforcement action is irrelevant, since there is also no deprivation at that time.

and take advantage of the opportunity for judicial review. Furthermore, the addition of the reimbursement provisions of CERCLA § 9606(b)(2) in 1986 clearly mitigates any concern that further procedural safeguards are needed. *See Solid State Circuits*, 812 F.2d at 398 n. 9 (inclusion of reimbursement "ameliorated significantly" pre-enforcement concerns of PRPs). Where, as here, a PRP can be made whole through post-deprivation procedures, pre-enforcement due process requirements are less strict. *See Brown v. Brienen*, 722 F.2d 360, 365 (7th Cir. 1983).

On the other hand, additional procedural requirements at the pre-enforcement stage would seriously compromise the government's interest. The primary purpose of CERCLA is the prompt cleanup of hazardous waste sites. *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985). This goal would be thwarted if every PRP were allowed and encouraged to pursue judicial review of an order prior to the enforcement of that order. Such a scenario runs directly counter to "the purpose of [CERCLA § 9613(h), which] is to prevent litigation from delaying remediation." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991). Clearly, the addition of procedural safeguards at the pre-enforcement stage would place significant burdens on the government, seriously compromising its interest in maintaining the environment and preventing the release of hazardous wastes.

[3] However, Wausau also maintains that the procedures offered are inadequate because the EPA failed to provide it with the documents which supported its conclusion that Wausau was properly named as a PRP. Wausau therefore contends that it was not in a position to determine whether it had "sufficient cause" to refuse

to comply with the administrative order. We are unconvinced by Wausau's arguments for several reasons. First, on a practical level, Wausau was fully aware of the extent of its involvement in the transfer of PCB-contaminated materials to the Romulus site. Similarly, it was equally able to speak with the other PRPs, one of which was its own insured, to determine the information compiled by the EPA. As a result, we see no basis for Wausau's argument that the EPA was possessed of information regarding Wausau's activities leading up to the contamination that Wausau itself did not have or have access to. However, even if the EPA had otherwise unattainable information regarding Wausau's potential liability, nondisclosure at the pre-enforcement stage did not violate Wausau's due process rights. *See Solid State Circuits*, 812 F.2d at 392 (finding CERCLA constitutional notwithstanding EPA's failure to "provide[ ] the challenging party with meaningful guidance as to the validity or applicability of the EPA order."). This is particularly true since "[t]he CERCLA statutory scheme, as amended by SARA, merely serves to effectuate a delay in a plaintiff's ability to have a full hearing on the issue of liability and does not substantively affect the adequacy of such a hearing." *Barmet*, 927 F.2d at 295. In other words, because CERCLA § 9606(b)(2) provides for judicial review of a party's liability, which is based upon a preponderance of the evidence and not limited to the administrative record, the limitations which exist at the pre-enforcement stage do not make the statute constitutionally infirm.[11] We are simply unwilling to expose the pre-en-

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[11] We also note that *Solid State Circuits* applied CERCLA as it existed before the addition of the reimbursement provision.

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forcement process to extended debates and discovery on the merits of an administrative order. To do so is not required under *Eldridge* to satisfy due process requirements; on the contrary, "[t]o delay remedial action until the liability situation is unscrambled would be inconsistent with the statutory plan to promptly eliminate the sources of danger to health and environment." *Lone Pine Steering Committee v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115, 106 S. Ct. 1970, 90 L.Ed.2d 654 (1986).

2. Post-Enforcement Review

[4] Wausau claims that the reimbursement provision of CERCLA § 9606(b)(2) violates due process, both as written and as applied. We reject each of these contentions. Wausau's claim that the provision is facially unconstitutional is based upon the rule that, where pre-enforcement due process protections are lacking, a deprived party is entitled to "prompt" post-deprivation review. *See, e.g. Industrial Park Development Co. v. EPA*, 604 F.Supp. 1136, 1141 (E.D. Pa. 1985). Wausau notes that CERCLA § 9606(b)(2) fails to limit the amount of time in which the EPA may consider a reimbursement petition, thus failing to insure a "prompt" post deprivation review. The flaw in Wausau's argument is apparent: as every court that has considered the issue has found, the pre-enforcement procedures available under CERCLA satisfy due

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[11] (...continued)
Thus, the constitutionality of CERCLA does not hinge upon the post-enforcement review available under CERCLA § 9606(b)(2); rather, that provision merely adds further support to a finding of constitutionality.

process requirements. Accordingly, the rule requiring "prompt" post-deprivation review does not apply.

[5] Wausau also raises two arguments in support of its claim that CERCLA § 9606(b)(2) is unconstitutional as applied. Again it claims that the EPA's failure to disclose liability evidence, this time during the reimbursement process, constituted a violation of due process. However, we recently concluded in the related case *Employers Ins. of Wausau v. Clinton*, 848 F.Supp. 1359 (N.D. Ill. 1994) that Wausau failed to satisfy the threshold requirement of "complying" with the order, and was thus not entitled to consideration of its reimbursement petition on the merits. As a result, any objection to the EPA's non-disclosure of liability evidence for the purpose of reimbursement is irrelevant. That is, the sole issue confronted by the EPA following Wausau's activities in cleaning up the Romulus site was whether Wausau complied with the order and completed the clean-up. Liability evidence was immaterial for that determination. Because the EPA concluded that Wausau had failed in its obligations at the site, it did not go on to determine whether Wausau was entitled to reimbursement, and disclosure of liability was unnecessary. *See* CERCLA § 9606(b)(2)(A). As a result, Wausau's "as applied" challenge never became ripe, and we shall therefore not consider it here.

[6] We also reject Wausau's other "as applied" constitutional challenge. As noted above, reimbursement is only available to a PRP which "receives and complies" with the EPA's order. *See* CERCLA § 9606(b)(2)(A). Wausau contends that, once all work is completed at a given site, 9606(b)(2) reimbursement should be available to any party who participated in the clean-up, regardless of who

actually completed the work.[12] This is, of course, contrary to the EPA's interpretation and application of the provision. It is well established that we must defer to an agency's interpretation of a statute it administers, as long as that interpretation is reasonable. *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). In the present case, we can not say that the EPA's interpretation of CERCLA § 9606(b)(2)(A) is unreasonable; on the contrary, it is the same reading which we would give the provision if the interpretation were initially within our province. Furthermore, such an interpretation does not affect the constitutionality of CERCLA. As discussed above, a PRP can refuse to comply with an administrative order and obtain judicial review before any deprivation of its property. In general, a litigant that receives no hearing from an agency cannot assert a due process claim if it failed to exercise an earlier option for a meaningful hearing. *See, e.g., AJA Assoc. v. Corps of Eng'rs*, 817 F.2d 1070, 1073 (3d Cir. 1987). We also reiterate that the government has a substantial interest in encouraging PRPs that start a clean-up job to finish that job; a project halted in mid-stride results in further public exposure to hazardous waste.[13]

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[12] For example, Wausau maintains that it is entitled to consideration of its reimbursement petition, even though it failed to fully comply with the order, since the all the necessary work at the site has been "completed," albeit by the EPA.

[13] Indeed, the heart of Wausau's objection is that it was required under the order to clean up non-PCB contaminants, notwithstanding the fact that even the EPA acknowledged that Wausau's potential responsibility was limited to PCB contamination. In our recent opinion in *Employers Ins. of Wausau*

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Finally, we note that the EPA does not have unfettered discretion to determine whether a PRP has "complied." Indeed, in the related case *Employers Ins. of Wausau v. Clinton*, 848 F.Supp. 1359 (N.D. Ill. 1994), we expressly reviewed the EPA's decision in that regard. Accordingly, we conclude that CERCLA's post-deprivation remedy, like its pre-enforcement procedures, comport fully with procedural due process.

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[13] (...continued)
v. Clinton, 848 F. Supp. 1359, 1367 (N.D. Ill. 1994), we noted that the EPA, to the extent consistent with the order, can require a PRP which has decided to clean-up a site to comply fully with that order, even if the order covers hazardous waste for which the PRP is not even potentially responsible, since that PRP can then be reimbursed to the extent the order was overbroad pursuant to CERCLA § 9606(b)(2)(D). We note at this juncture, however, that the undisputed overbreadth of an order must also provide "sufficient cause" for noncompliance in the first instance. We reach this conclusion based upon the statute's history. The reimbursement provision was added in 1986; prior to that date, a party potentially responsible for certain wastes at a site could only rely upon the "sufficient cause" exception to challenge an overbroad order. If the overbreadth of an otherwise legitimate order did not constitute "sufficient cause" for non-compliance, then the EPA could have forced a PRP to clean up all hazardous waste at a site, with no possibility of a hearing or review at any time, a clearly unconstitutional interpretation of "sufficient cause." We see no indication that Congress intended to change this necessary understanding of "sufficient cause" in adding the reimbursement provision in 1986. Indeed, the continuing validity of this interpretation of "sufficient cause" is borne out in defendants Memorandum in Support of the present motion: "A recipient of a section 106 order that has sufficient cause to believe the order erroneous *in some respect* has sufficient self-interest to refuse to comply and to obtain judicial review of the order prior to expending any of its property." (emphasis added). As a result, it is clear that Wausau could have challenged the order at the pre-enforcement stage, based solely on its overbreadth.

B. Substantive Due Process

[7] The second count of Wausau's third amended complaint asserts a violation of substantive due process. As we stated in *Universal Sec. Ins. Co. v. Koefoed*, 775 F.Supp. 240 (N.D. Ill. 1991), "[w]hile procedural due process assures fair procedure in the decision-making process, the substantive due process clause is concerned with the decision itself." *Id.* at 244. We initially observe that the controversial and complex concept of "substantive due process" remains nebulous, and its contours with respect to property interests have not yet been defined by the Supreme Court. *See, e.g., New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1480 n. 5 (7th Cir. 1990). *See also Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337, 1342 (7th Cir. 1987) (noting the "oxymoron of substantive due process"); *Koefoed*, 775 F.Supp. at 244 ("The substantive component of the due process clause has been referred to as an area of the law 'famous for its controversy, and not known for its simplicity.' ") (citation omitted). Notwithstanding these observations, the Seventh Circuit has set forth certain requirements for the successful maintenance of a substantive due process claim; "in addition to alleging that the decision was arbitrary and irrational, 'the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies.' " *New Burnham*, 910 F.2d at 1481 (citations omitted).[14] These re-

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[14] *New Burnham* arose in the context of state-based property rights, thus explaining the reference to the adequacy of state law, as opposed to federal law, remedies. However, there is no reason that the Seventh Circuit's requirements would not apply equally to claims based upon federal law. As a result, we

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quirements are clearly not met in the present action.

[8] As discussed above, Wausau has failed to establish that the remedial scheme under CERCLA violated Wausau's procedural due process rights. Wausau can therefore not hang its substantive due process claim on this hook. Likewise, Wausau is unable to show a separate constitutional violation. Of course, Wausau has alleged that the EPA violated both procedural due process and principles of equal protection. Again, however, we rejected Wausau's procedural due process claim above, and we reject Wausau's equal protection claim below. Our conclusions with respect to these issues therefore leave Wausau without a basis for its substantive due process claim, even if the EPA's actions were arbitrary and irrational. This case is thus similar to both *New Burnham* and *Koefoed*, in which the courts rejected procedural and/or equal protection claims, thereby eliminating the grounds for a substantive due process claim. *See New Burnham*, 910 F.2d at 1481; *Koefoed*, 775 F.Supp. at 246. Because Wausau has failed to meet the Seventh Circuit's requirements for maintaining a substantive due process claim, we grant defendants' motion for judgment on the pleadings on Count II of Wausau's third amended complaint.[15]

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[14] (...continued)
will look generally to the sufficiency of procedural remedies to determine whether Wausau's substantive due process claim will fail or succeed.

[15] An indication of the limited stock which Wausau placed in its substantive due process claim is the fact that its sole response to defendants' motion for judgment on Count II came in a footnote in its Response Memorandum. Of course, in Wau-
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C. Equal Protection

[9] In Count III, Wausau claims that the defendants violated the equal protection clause by treating Wausau differently than other PRPs. It is well established that "[i]n order to assert a constitutional claim based on violation of equal protection, a complaining party must assert disparate treatment based on their membership in a particular group." *New Burnham Prairie Home, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990). In other words, a plaintiff must demonstrate that the disparate treatment is causally connected to the characteristics of a group of which the plaintiff is a part, not the individual characteristics of the plaintiff itself. *Id. See also Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) ("[T]he decision maker [must have] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects *upon an identifiable group*.") (emphasis added). Here Wausau claims that it was in a "class of potentially liable parties which are financially able to incur response costs." Plaintiff's Amended Response Memorandum at 23. However, even if this is a cognizable class, Wausau has utterly failed to

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[15] (...continued)
sau's case, this should come as no surprise, since Wausau's brief is replete with footnotes, totalling thirty-three footnotes over twenty-five pages. Indeed, all but two pages of Wausau's twenty-one page argument include at least one footnote, and ten contain two or more. These footnotes, in turn, range from as little as three to as many as forty-one single spaced lines, in several cases occupying well over half the page. This court frowns on parties who attempt to thwart well-established page limits by crowding substantive arguments into multiple single-spaced footnotes. We will simply give such arguments the respect which their placement indicates they deserve.

allege that it was treated differently "because of" its membership in this group. On the contrary, Wausau asserts that it was "accorded treatment by EPA that was *dissimilar* to the EPA's treatment of other financially-able PRPs." *Id.* (emphasis added). Because Wausau has effectively refuted its own claim of *group*-based discrimination, it has also thwarted its equal protection claim. Defendants are therefore entitled to judgment on the pleadings on Count III of Wausau's third amended complaint.

D. Administrative Procedure Act

[10] Wausau's final count seeks review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 700 *et seq.* Specifically, Wausau would have us conclude that the EPA's determination that Wausau was a PRP, and its subsequent actions, were unsupported by substantial evidence, arbitrary, capricious, and not in accordance with law. Congress enacted the APA to guarantee that individuals could obtain review for actions taken by administrative agencies. However, the APA applies only when "there is no other adequate remedy in a court." APA § 704. In addition, the APA does not apply "to the extent the relevant statute 'preclude[s] judicial review.' " *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345, 104 S. Ct. 2450, 2453, 81 L.Ed.2d 270 (1984) (quoting APA § 701(a)(1)). CERCLA § 9613(h) expressly limits the times at which a party may seek review of any order issued under CERCLA § 9606(a), which is essentially what Wausau is seeking in Count IV. Specifically, a party may only obtain judicial review of a CERCLA § 9606(a) order in one of the following five actions:

> (1) An action under section 9607 of this title to recover response costs or damages or for contribution.

> (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
>
> (3) An action for reimbursement under section 9606 (b)(2) of this title.
>
> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
>
> (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

CERCLA § 9613(h). It is therefore apparent that CERCLA provides for review of the issue Wausau raises in Count IV, and that CERCLA precludes judicial review of that issue outside the scope of CERCLA § 9613(h). Accordingly, review under the Administrative Procedure Act is inappropriate here.[16] We therefore grant defendants' motion for judgment on the pleadings with respect to Count IV.

V. Conclusion

For the reasons set forth above, we grant defendants' motion for judgment on the pleadings. It is so ordered.

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[16] We also note that Wausau has completely failed to respond to defendants' motion of judgment on Count IV, thereby conceding defendants' arguments in support of that motion. *See Valluzzi v. United States Postal Service*, 775 F. Supp. 1124, 1125 (N.D. Ill. 1991); *Southern Nevada Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 1104, 1109 (D. Nev. 1989).

UNITED STATES CONSTITUTION

AMENDMENT [V].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 96-510, Dec. 11, 1980, 94 Stat. 2767 *et seq.*; Pub. L. 96-561, Dec. 22, 1980, 94 Stat. 3300, *et seq.*; Pub. L. 99-499, Oct. 12, 1986, 100 Stat. 1613, *et seq.*

ABATEMENT ACTION

42 USC 9606

Sec. 106. (a) In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have the jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b)(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issues under subsection (a) may, within 60 days after completion of the required action, petition the President or reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue in the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 107(a) may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs in-

curred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28 of the United States Code.

(c) Within one hundred and eighty days after enactment of this Act, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this Act. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 311(c)92, 308, 409, and 504(a) of the Federal Water Pollution Control Act, (2) sections 3007, 3008, 3013, and 7003 of the Solid Waste Disposal Act, (3) sections 1445 and 1431 of the Safe Drinking Water Act, (4) sections 113, 114, and 303 of the Clean Air Act, and (5) section 7 of the Toxic Substances Control Act.

LIABILITY

42 USC 9607

Sec. 107. (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i).

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an at of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c)(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving releases of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of 1979), or rolling stock, $50,000,000 or such

lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 101(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this title.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of title 49 of the United States Code or vessels subject to the provisions of title 33, 46, or 46 Appendix of the United States Code, subparagraph (A)(ii) of this para-

graph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 112(c) of this Act. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

42 USC 9613

Sec. 113. (h) Timing of Review.—No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 121 (relating to cleanup standards) to review any challenged to removal or remedial action selected under section 104, or to review any order issued under section 106(a), in any action except one of the following:

(1) An action under section 107 to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 106(a) or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 106(b)(2).

(4) An action under section 310 (relating to citizens suits) alleging that the removal or remedial action taken under section 104 or secured under section 106 was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 106 in which the United States has moved to compel a remedial action.

42 USC 9613

Sec. 113. (j) Judicial Review.—

(1) Limitation.—In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard.—In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy.—If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the National Contingency Plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural Errors.—In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevant to the action that the action would have been significantly changed had such errors not been made.

42 USC 9613

Sec. 113. (k) Administrative Record and Participation Procedures.—

(1) Administrative Record.—The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation Procedures.—

(A) Removal Action.—The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial Action.—The President shall provide for the participating of interested persons, including potentially responsive parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 117(a)92) (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 117(d). The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code to carry out the requirements of this subparagraph.

(C) Interim Record.—Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this Act shall not include an adjudicatory hearing.

(D) Potentially Responsible Parties.—The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 17, 1995

Before

Hon. Richard A. Posner, Chief Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Robert A. Grant, District Judge*

EMPLOYERS INSURANCE OF WAUSAU, a mutual company,
Plaintiff-Appellant,

Nos. 94-2005, 94-2006, 94-2081 v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 91 C 4254, 93 C 1366—**Marvin E. Aspen**, *Judge.*

ORDER

On April 26, 1995, plaintiff-appellant filed a petition for rehearing with a suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

---

* Hon. Robert A. Grant of the Northern District of Indiana, sitting by designation.

(Letterhead of)
SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

August 2, 1995

Mr. William J. Anaya
Johnson & Bell, LTD.
222 N. LaSalle St., Suite 2200
Chicago, IL 60601

Re: Employers Insurance of Wausau,
a mutual company
v. Carol M. Browner, Administrator,
Environmental Protection Agency,
et al.
Application No. A-96

Dear Mr. Anaya:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on August 2, 1995, extended the time to and including September 14, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Clayton R. Higgins, Jr.
Assistant Clerk

[Notification List omitted in Printing]

Supreme Court U
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CLERK

No. 95-434

In the Supreme Court of the United States

OCTOBER TERM, 1995

EMPLOYERS INSURANCE OF WAUSAU, PETITIONER

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in deferring to the Environmental Protection Agency's interpretation of an order that the agency issued pursuant to its enforcement authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9606(a).

2. Whether the court of appeals correctly held that the procedures for judicial review available under CERCLA, which provide an opportunity for both pre-enforcement and post-enforcement hearings, satisfy due process requirements.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-434

EMPLOYERS INSURANCE OF WAUSAU, PETITIONER

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 52 F.3d 656. The opinions of the district court (Pet. App. 19-38 and 39-60) are reported at 848 F. Supp. 1359 and 848 F. Supp. 1369.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18) was entered on April 12, 1995. A petition for rehearing was denied on May 17, 1995. On August 2, 1995, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 14, 1995. The petiton for a writ of certiorai

was filed on September 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, establishes a uniform framework for addressing the problem of inactive hazardous-waste sites throughout the United States. "CERCLA both provides a mechanism for cleaning up hazardous-waste sites, 42 U.S.C. §§ 9604, 9606 * * *, and imposes the costs of the cleanup on those responsible for the contamination, § 9607." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989). The President's authority under CERCLA, most of which has been delegated to the Environmental Protection Agency (EPA), includes the power to compel clean-up actions by potentially responsible parties or to undertake a federal response and recover expenses from responsible parties. 42 U.S.C. 9604, 9606-9607 (1988 & Supp. V 1993); see also *United States* v. *Ottati & Goss, Inc.*, 900 F.2d 429, 433 (1st Cir. 1990) (describing federal response options).

Because the primary purpose of CERCLA is the prompt elimination of threats to health and the environment posed by hazardous wastes, the statute authorizes a federal response prior to the ultimate determination and apportionment of liability regarding contamination at a particular site. See *Lone Pine Steering Committee* v. *EPA*, 777 F.2d 882, 886 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986). In order to facilitate the statutory objective of prompt clean-up of contaminated sites, CERCLA authorizes the EPA to pursue three alternative response options when the agency determines that there has been an actual or

threatened release of a hazardous substance. 42 U.S.C. 9604(a)(1). First, the EPA may respond directly by using monies from the Superfund[1] to undertake removal or remedial actions[2] that it deems "necessary to protect the public health or welfare or the environment," then seeking to recover the costs of the clean-up from responsible parties. 42 U.S.C. 9604 and 9607. Second, the EPA may bring an action in federal district court to obtain an order requiring responsible parties to take such action as may be necessary to abate the threat posed by the hazardous substance. 42 U.S.C. 9606. Third, as in this case, the EPA may issue an administrative order pursuant to Section 106(a) of CERCLA, 42 U.S.C. 9606(a), directing potentially responsible parties to take appropriate response actions.

Before October, 1986, entities that received a CERCLA administrative order could either comply with the order or refuse to do so and risk an EPA enforcement action. In 1986, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613. SARA amended CERCLA to create a procedure

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[1] The Hazardous Substance Superfund created by Section 111 of CERCLA, 42 U.S.C. 9611, contains monies available for use by the EPA in implementing various response activities. See *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 359-361 (1986) (describing structure and purposes of the Superfund).

[2] "Removal" actions are defined broadly and include a wide range of actions taken to study, clean up, prevent, or otherwise address releases and threatened releases. 42 U.S.C. 9601(23). "Remedial actions" are those actions "consistent with permanent remedy; taken instead of or in addition to removal actions * * *." 42 U.S.C. 9601(24). "Response" actions include removal and remedial actions. 42 U.S.C. 9601(25).

under which parties who comply with administrative orders may obtain reimbursement of their response costs from the Superfund. Thus, current Section 106(b) (2) (A) of CERCLA provides:

> Any person who receives *and complies with* the terms of any order issued under [42 U.S.C. 9606(a)] may, within 60 days *after completion of the required action*, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

42 U.S.C. 9606(b)(2)(A) (emphasis added).

If the EPA (on behalf of the President) refuses to grant a party's reimbursement petition, that party may file an action seeking reimbursement in federal district court. 42 U.S.C. 9606(b)(2)(B). In such an action, where the party has fully complied with the administrative order, it may recoup response costs by establishing, "by a preponderance of the evidence," that it is not liable for response costs under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), and that the costs it seeks to recover are reasonable in light of the action required by the administrative order. 42 U.S.C. 9606(b)(2)(C). Alternatively, a party who *is* liable for response costs under Section 107(a) may recover its reasonable response costs "to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." 42 U.S.C. 9606(b)(2)(D).

1. These consolidated cases arise out of the contamination, and eventual clean-up, of an oil recycling facility in Romulus, Michigan (the site). Petitioner issued a fire insurance policy to the owner

of a building in Wyandotte, Michigan. Gov't C.A. Br. 6. The building was destroyed by fire in August, 1987. Pursuant to the policy, petitioner agreed to have removed from the property certain debris, including fluids and oils contained in several electrical transformers. In April, 1989, seven hundred gallons of fluids were removed from the transformers and transported to the site in Romulus. At the site, the fluids were placed in process tanks for recycling. Pet. App. 20-21.

Soon after that, the EPA investigated the Romulus facility and determined that the site was contaminated by hazardous substances that posed an imminent and substantial danger to public health and the environment. Gov't C.A. Br. 3-4. The substances included polychlorinated biphenyls (PCBs)[3] and volatile organic compounds (VOCs).[4] Pet. App. 21. The EPA traced the source of the PCB contamination to the oil that was removed from the Wyandotte, Michigan, facility and transported to the Romulus site. *Ibid.*

On September 11, 1989, the EPA designated petitioner as a potentially responsible party (PRP) under

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[3] PCBs are a class of compounds, formerly used as nonflammable coolant in electrical equipment, that are extremely toxic. They have been found to cause cancer, liver damage, and other adverse health effects. See *Environmental Transp. Systems, Inc.* v. *Ensco*, 969 F.2d 503, 505 n.1 (7th Cir. 1992) (describing PCBs as "among the most hazardous man-made chemical substances.").

[4] VOCs also cause adverse human health effects, including cancer. See *Natural Resources Defense Council* v. *EPA*, 824 F.2d 1211 (D.C. Cir. 1987).

CERCLA[5] and requested petitioner's participation in the clean-up of the site. When petitioner failed to respond, the EPA issued an administrative order, pursuant to Section 106 of CERCLA, 42 U.S.C. 9606, in which it required petitioner and other PRPs to clean up the site. See Pet. App. 21. The order specified a number of clean-up tasks, none of which was limited to PCB-contaminated areas. *Id.* at 23.

Petitioner subsequently submitted an Emergency Response Action Plan (ERAP) in which it committed to "comply with the Order to the extent technically feasible under climatic conditions existing at the Site." Pet. App. 23. The EPA approved petitioner's ERAP on February 26, 1990. *Id.* at 22.

Petitioner began cleaning up the site, but it informed the EPA through several telephone calls and letters that it did not believe that it was responsible for cleaning up any non-PCB contamination. In response, the EPA insisted that both the order and the ERAP required petitioner to clean up all hazardous substances located at the site, whether or not they were contaminated by PCBs. Pet. App. 24. Petitioner ended its clean-up efforts on January 24, 1991, and contended that it had complied with the terms of the order. *Id.* at 24-25.

On March 22, 1991, petitioner submitted to the EPA a petition for reimbursement of its response costs. The EPA responded that petitioner had not yet completed the clean-up, as required by the order and

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[5] A potentially responsible party is any person who may be liable pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a), for response costs incurred, or to be incurred, by the United States, not inconsistent with the National Contingency Plan, 40 C.F.R. Pt. 300.

ERAP, and presented petitioner with a list of tasks that remained unperformed. Petitioner persisted in its position and the EPA completed the clean-up on October 25, 1991. Pet. App. 25.

On June 2, 1992, the EPA issued a preliminary decision denying petitioner's reimbursement petition on the ground that petitioner had failed to complete the required clean-up. In response, petitioner submitted numerous written comments and exhibits in support of its position. After reviewing petitioner's submissions, the EPA, on January 28, 1993, issued a final decision denying the petition for reimbursement. Pet. App. 25.

2. Petitioner filed two separate actions in federal district court, *Employers Insurance of Wausau* v. *Clinton*, No. 93 C 1366 (N.D. Ill.) (the *Clinton* case), and *Employers Insurance Company of Wausau* v. *Browner*, No. 91 C 4254 (N.D. Ill.) (the *Browner* case).

a. In the *Clinton* case, petitioner sued the President of the United States under Section 106(b)(2)(B) of CERCLA, 42 U.S.C. 9606(b)(2)(B), and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* In that suit, petitioner sought review of the EPA's decision to deny petitioner's reimbursement petition.

The district court granted summary judgment for the government. The court first observed that, while CERCLA provides for judicial review of the EPA's determination that a party is liable for response costs —pursuant to Section 106(b)(2)(C)—and for review of the extent of that liability—pursuant to Sections 106(b)(2)(D) and 113(j)—"there is no explicit provision for review of the EPA's determination that a party did not 'comply' with the relevant Order, and is thus not

entitled to consideration of its petition on the merits." Pet. App. 29. The court concluded that CERCLA does not provide for judicial review of EPA "compliance" determinations, and that review could be had pursuant to the APA, 5 U.S.C. 704, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." Pet. App. 31.

Pursuant to Section 706 of the APA, the district court considered whether the EPA's noncompliance ruling was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Based on its review of "the administrative record compiled and relied upon by the agency" (Pet. App. 34), the court upheld the EPA's decision that petitioner failed to comply with the agency's clean-up order and that consideration of the reimbursement petition was foreclosed. *Id.* at 32-34. Specifically, the court found the agency's conclusion that the order and ERAP applied to all hazardous wastes at the site to be "entirely supportable" (*id.* at 34), and determined, based on "undisputed facts, * * * that [petitioner] failed to comply with the Order and ERAP. Because compliance with the Order is, under CERCLA, a prerequisite to entitlement to reimbursement, [petitioner] is precluded from seeking reimbursement from the Fund." *Id.* at 37-38.

b. In the *Browner* case, petitioner filed an action for "nonstatutory review"[6] under 28 U.S.C. 1331 against the United States, the EPA, and various EPA officials. In that action, petitioner contended that the

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[6] See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), *Marozsan* v. *United States*, 852 F.2d 1469, 1474 (7th Cir. 1988) (en banc).

EPA's administrative process violated its Fifth Amendment rights to due process and equal protection. Petitioner also alleged that the EPA's designation of petitioner as a PRP was not supported by substantial evidence. See *Employers Insurance Company of Wausau* v. *Browner*, No. 91 C 4254 (N.D. Ill.), Third Amended Complaint 23-32.

The district court granted judgment on the pleadings for the government. With respect to petitioner's constitutional claims, the court concluded that CERCLA's administrative and judicial review provisions satisfy the due process criteria set out by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and that petitioner had not alleged disparate governmental treatment so as to implicate the equal protection component of the Fifth Amendment. Pet. App. 47-52, 58-59. The court dismissed petitioner's APA claim on the grounds that the EPA's designation of petitioner as a PRP was not reviewable under the APA (*id.* at 59-60), and that, in any event, petitioner had conceded the invalidity of that claim by failing to respond to the government's motion for judgment on that issue. *Id.* at 60 n.16.[7]

3. The court of appeals consolidated the two cases and affirmed the judgment in each. Pet. App. 1-17. With respect to the EPA's noncompliance determination, the court assumed, without deciding, that the ruling was subject to nonstatutory review. The

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[7] In a third suit brought by petitioner under the Federal Tort Claims Act, the district court dismissed the complaint and the court of appeals affirmed. *Employers Ins. of Wausau* v. *Bush*, 791 F. Supp. 1314 (N.D. Ill. 1992), aff'd, 27 F.3d 245 (7th Cir. 1994). Petitioner did not seek further review of that decision.

court held, however, that such agency action may also be reviewed in a suit for reimbursement under Section 106(b)(2). Pet. App. 7.[8] The court of appeals agreed with the district court that compliance with an administrative clean-up order is a prerequisite to consideration of a reimbursement claim. *Id.* at 7, 11.

The court reviewed the EPA's noncompliance determination under an "arbitrary or capricious" standard. Pet. App. 17. A deferential standard was appropriate, the court held, because petitioner sought review of the agency's interpretation of its own order, because the agency possesses statutory authority to issue and interpret clean-up orders, and because the question of compliance is technical in nature. *Id.* at 15-16.

Applying that standard to the facts of the case, the court upheld the EPA's determination that petitioner had not complied with the clean-up order. Pet. App. 17. Observing that "the Order by its terms embraces all hazardous substances at the recycling facility, regardless of the particular type of substance," the court found that the EPA's noncompliance determination was reasonable. *Ibid.*

The court rejected petitioner's constitutional claims as "baseless." Pet. App. 2. It held that, because a party served with a clean-up order may refuse to obey the order and obtain judicial review of its liability if and when the EPA seeks to enforce the order, CERCLA's judicial review provisions would be constitutional even absent the post-enforcement

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[8] The court noted that, in either type of suit, judicial review is confined to the record compiled in the administrative proceeding. See Section 113(j)(1) of CERCLA, 42 U.S.C. 9613 (j)(1). Pet. App. 7.

reimbursement mechanism contained in Section 106(b) (2). Pet. App. 11.[9]

ARGUMENT

1. The court of appeals correctly determined that compliance with an EPA clean-up order is a statutory prerequisite to the consideration of a reimbursement petition, and that the agency's evaluation of a party's compliance with such an order warrants deference. The court's decision, moreover, does not conflict with any decision of this Court or of another court of appeals.[10] Further review therefore is not warranted.

The plain language of Section 106(b) (2) establishes that only a party "who receives *and complies with the terms of*" an administrative clean-up order may seek reimbursement. 42 U.S.C. 9606(b)(2)(A) (emphasis added). That provision, moreover, expressly requires "completion of the required action." *Ibid.* "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).

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[9] The court also noted that potential sanctions for violating valid orders are tempered by the availability of a "sufficient cause" defense. Pet. App. 11, citing *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 391-392 (8th Cir. 1987) (construing 42 U.S.C. 9607(c)(3)).

[10] Contrary to petitioner's contention (Pet. 11-13), any conflict between the decisions of the district court and the court of appeals in this case would not warrant this Court's review. Cf. Rule 10.1 of the Rules of this Court. In any event, the courts below were in agreement that EPA's findings of non-compliance with the administrative order must be reviewed under a deferential standard. See Pet. App. 17, 33.

Once it determined that compliance with the EPA's order was a statutory condition for the consideration of a reimbursement claim, the court of appeals correctly deferred to the agency's interpretation of that order. As the court noted (Pet. App. 15), the court or agency that issues an order necessarily has special insight into the meaning and application of that order. *Martin* v. *Occupational Safety & Health Review Commission*, 499 U.S. 144, 150-151 (1991). In addition, EPA administrative orders of the kind at issue here are often highly technical in nature. Deference to the EPA's reading of the order accords with the agency's technical expertise in substantive matters arising under the statute. See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989).

Contrary to petitioner's contention (Pet. 14-19), the court of appeals' decision in this case does not conflict with *Dico* v. *Diamond*, 35 F.3d 348 (8th Cir. 1994). In *Dico*, the EPA denied a petition for reimbursement on the ground that the clean-up order in that case was issued before the effective date of the reimbursement provision. *Id.* at 350. The Eighth Circuit disagreed, and held that the EPA's interpretation *of the relevant statute*—Section 106(b)(2)—was not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See, *e.g.*, *Dico*, 35 F.3d at 351 ("*Chevron* requires deference to an agency's interpretation *of a statutory provision* only if the agency is charged with administering the statute.") (emphasis added).

Consistent with *Dico*, the court below did not defer to the EPA's construction of Section 106(b)(2). Rather, it made an independent determination that compliance with an administrative clean-up order is a

precondition for consideration of a reimbursement petition. See, *e.g.*, Pet. App. 11 ("The terms 'compliance' and 'completed' in the statute cannot be tortured long or hard enough to yield authorization for [the construction advanced by petitioner]."). The court afforded deference only to the EPA's interpretation of its own *order*.[11] See Pet. App. 15 ("when the document is an order, the court or agency that issued it is, sensibly enough, considered to have special insight into its meaning, so review is deferential") (citing, *inter alia*, *Martin* v. *Occupational Safety & Health Review Commission*, 499 U.S. at 150-151). The decision below, which is the first to address a challenge to an EPA determination of noncompliance with a CERCLA Section 106 order, does not warrant this Court's review.

Petitioner contends that the court of appeals' decision conflicts with cases that address the scope of CERCLA liability under Section 107. Pet. 21, citing *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 901-902 (5th Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 722-723 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 268-270 (3d Cir. 1992). Neither the EPA nor either of the lower courts in this case, however, considered petitioner's liability under Section 107.

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[11] For the same reason, petitioner is incorrect in contending (*e.g.*, Pet. 9) that the decision below is inconsistent with *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990). In *Adams Fruit*, the Court declined to defer to the Department of Labor's construction of certain provisions of the Migrant and Seasonal Agriculture Worker Protection Act, 29 U.S.C. 1801 *et seq.* *Adams Fruit*, 494 U.S. at 649. The Court did not consider the degree of deference that should be afforded to an agency's interpretation of its own order.

The EPA issued the administrative order in this case to five *potentially* responsible parties. The order did not purport to impose or apportion liability. Rather, consistent with CERCLA's statutory objectives, the order sought to secure prompt abatement of imminent health and environmental dangers, unencumbered by extended litigation over the apportionment of liability. See *Kelley* v. *EPA*, 15 F.3d 1100, 1106 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 900 (1995); *Wagner Seed Co.* v. *Daggett*, 800 F.2d 310, 315 (2d Cir. 1986). Similarly, in reviewing the EPA's determination that petitioner had not complied with its clean-up order, neither the district court nor the court of appeals considered whether petitioner is ultimately liable under Section 107. Each court agreed with the EPA that petitioner had failed to comply with the agency's order, and that, as a result, petitioner could not avail itself of the reimbursement provision. See Pet. App. 17, 38.

2. The court of appeals correctly held that CERCLA's administrative and judicial review provisions satisfy the requirements of due process. Pet. App. 2-3, 11. That holding, moreover, is consistent with the decision of every other court of appeals that has considered the question. See *Wagner Seed Co.* v. *Daggett*, 800 F.2d at 315-316 (Section 106); *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 390 (8th Cir. 1987) (same); *Schalk* v. *Reilly*, 900 F.2d 1091, 1097-1098 (7th Cir.) (Section 113), cert. denied, 498 U.S. 981 (1990); *Barmet Aluminum Corp.* v. *Reilly*, 927 F.2d 289, 295-296 (6th Cir. 1991) (same); *Dickerson* v. *Administrator, EPA*, 834 F.2d 974, 978 n.7 (11th Cir. 1987) (same).

Reardon v. *United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc), is not to the contrary. In *Reardon*,

the agency filed a notice of lien on contaminated property pursuant to Section 107(*l*) of CERCLA, 42 U.S.C. 9607(*l*). The court found that the lien notice was a deprivation of a significant property interest, and that CERCLA provided neither a pre-deprivation hearing nor adequate post-deprivation review. As a consequence, the court held, the lien provision denied property owners due process. 947 F.2d at 1518-1519.

As the court of appeals in this case observed (Pet. App. 11), CERCLA's administrative order provisions include both pre- and post-enforcement review mechanisms. Parties who disagree with the substance or scope of a clean-up order may refuse to comply with that order and receive a judicial hearing as to their liability, and other defenses to the order, if and when the EPA seeks to enforce the order. Unlike the lien provision at issue in *Reardon*, moreover, if the EPA never seeks enforcement, there is no deprivation. Compare *Reardon*, 947 F.2d at 1518 (noting impairment to property rights caused by outstanding liens and attachments).

The reimbursement provision added by the 1986 SARA amendments provides an adequate method of post-enforcement review. Where a party chooses to comply with an administrative clean-up order, it may petition for reimbursement and, if the agency denies the petition, seek judicial review. The fact that full compliance with the administrative order is a prerequisite to post-enforcement review does not invalidate the statutory framework (which, as we have noted, includes the pre-enforcement review alternative). See *Wagner Seed Corp.* v. *Daggett*, 800 F.2d at 316-317.

The court of appeals correctly concluded that petitioner was not denied due process in connection

with the clean-up order in this case. Petitioner asserted its substantive position during the administrative process (Pet. App. 24-25), and had the opportunity to seek a judicial hearing—before having to comply with the order—in which it could have obtained an adjudication of its liability and raised any defenses to the order. See, *e.g.*, *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d at 390; *Gary Steel Supply Co.* v. *Reagan*, 711 F. Supp. 471, 472 (N.D. Ill. 1989). In addition, petitioner was aware of the EPA's interpretation of the administrative order before it chose to halt its clean-up activities. Pet. App. 24. The limited post-enforcement review that was available to petitioner as a result of its own choices of how to proceed is not a denial of due process. See *AJA Associates* v. *Army Corps of Engineers*, 817 F.2d 1070, 1073 (3d Cir. 1987) (an "applicant cannot lay blame on an agency for the applicant's own failure to pursue every available channel of advocacy").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EMPLOYERS INSURANCE OF WAUSAU,
A Mutual Company,

Petitioner,

v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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STATUTES

Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. § 9601 *et seq.*, hereinafter referred to as:

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PETITIONER'S REPLY BRIEF

I.

THE SEVENTH CIRCUIT'S RULING ON FEDERAL JURISDICTION IS IN CONFLICT WITH THE EIGHTH CIRCUIT'S RULING AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW FOR THIS COURT'S REVIEW.

A. Rather than address the question of federal jurisdiction, Respondents chose instead to argue the propriety of the limited, albeit deferential, review performed by the two courts below. Yet, any such discussion is premature and irrelevant, at least until the question of federal jurisdiction is resolved. The proper question requiring this

Court's review is: In reimbursement actions, did Congress provide federal jurisdiction pursuant to CERCLA § 106(b)(2)(A) as held by the Seventh Circuit Court of Appeals below? Pet. App. 8. Or, did Congress provide federal jurisdiction pursuant to CERCLA § 106(b)(2)(B), and create only a pre-litigation, administrative opportunity to resolve reimbursement issues under CERCLA § 106(b)(2)(A)? See *Dico v. Diamond*, 35 F.3d 348, 352 (8th Cir. 1994). Unquestionably, the Seventh Circuit "rendered" its decision in direct conflict with the decision of the Eighth Circuit in *Dico*. See Rule 10.1(a).[1]

The Eighth Circuit did not *hold* that the Agency's interpretation of the relevant statute was not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Resp. Br. 12. Rather, in *Dico*, the Eighth Circuit *concluded that it did not have to decide that issue,* because as a matter of fact, Dico had "received and complied" with the order after the effective date of the reimbursement provisions.[2] *Dico*, 35 F.3d at 353.

Finally, the Circuit Court below is *not* "the first to address a challenge to an EPA determination of noncom-

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[1] Respondents concede that there is a conflict between the courts below. Resp. Br. 11 n.10. That conflict highlights "an important question of federal law which has not been, but should be, settled by this Court." See Rule 10.1(c).

[2] Also, citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990), the Eighth Circuit *held* that the *relevant* reimbursement provisions of the statute are administered only by the courts, and *not* by the Agency and that the Agency's "interpretation" was not an interpretation but a substantive determination not appropriate for deference. *Dico*, 35 F.3d at 351, 352 n.4 ("We fail to discern a difference between issues of qualification and issues of liability").

pliance with a CERCLA Section 106 order." Resp. Br. 13. But even if it were, the point still begs the question: What is the source of federal jurisdiction?

The Eighth Circuit in *Dico* reviewed the specific CERCLA § 106(a) *order* and *held* that the Agency's substantive determination of "non-compliance" with the specific CERCLA § 106(a) *order* was wrong.

> Assuming *arguendo* that EPA is correct that a party seeking reimbursement must have both "received and complied" with an *order* subsequent to SARA's effective date to qualify for the benefits of this provision, *we believe Dico meets this standard*. It is undisputed that *the order* issued to Dico thrice was modified after the date the reimbursement provision became law. Moreover, the cumulative effect of the modifications made the *resulting order* considerably different from EPA's *original order*, and the cleanup work was not commenced until the EPA made its final modifications to *the order*. In these circumstances, we conclude that *the order* was not final for purposes of interpretation of the "receives and complies" language until the last modification was made. This means that Dico did not "receive," and was unable to "comply" with *the order* until . . . after the reimbursement provision was effective.

Dico, 35 F.3d at 353 (internal citations omitted; some emphasis added).

The holding in *Dico* was not resolved merely by statutory construction. See Resp. Br. 12, 13. Also, the Eighth Circuit's decision in *Dico*, like the Seventh Circuit's decision below, addressed a challenge to the Agency's determination of compliance (referred to as "noncompliance" by Respondents) with a CERCLA § 106(a) unilateral administrative order. And, like *Dico*, the Seventh Circuit

concluded that deference to the Agency's statutory construction was unnecessary, if not improper.[3] However, the key question is: Where do federal courts find jurisdiction to make their respective conclusions?

Moreover, the decision below is simply another case in a long line of cases struggling with the reimbursement provisions. In addition to the two courts below, and the *Dico* opinions in the Eighth Circuit cited in the Petition, *see also*, *Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992), explained in *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied sub nom. American Banker's Association v. Kelley*, 115 S. Ct. 900 (1995); *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323 (7th Cir. 1990); *Gary Steel Supply Co. v. Reagan*, 711 F. Supp. 471 (N.D. Ill. 1989). Furthermore, the reimbursement provisions were added in response to significant, still relevant, concerns articulated by other courts. *See*, e.g., *Wagner Electric v. Thomas*, 612 F. Supp. 736 (D. Kan. 1985); *Aminoil, Inc. v. EPA*, 599 F. Supp. 69 (C.D. Calif. 1984); *U.S. v. Reilly Tar and Chemical Corporation*, 606 F. Supp. 412 (D. Minn. 1985). All of the post-SARA cases "addressed" challenges "to an EPA determination of noncompliance with a CERCLA Section 106 order." Only this Court can resolve the split of authority in the circuits and the important questions of federal law involving the reimbursement provisions. See Rule 10.1.

B. Respondents also fail to address the relevant policy considerations at issue. Notwithstanding CERCLA's goal of encouraging prompt environmental cleanups, does the

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[3] See *Dico*, 35 F.3d at 352; Pet. App. 15, 16.

Agency have power under the statute, and authority under the Constitution, to order a citizen to perform acts which, no one denies, the Agency could not compel in court *under the very same statute*? Moreover, how does the Seventh Circuit's rule encourage prompt cleanups, providing, as it does, that a *potentially* responsible party can choose complete *defiance* to the all-too-familiar overly broad order?

C. Furthermore, as to Respondents' repeated references that no one has determined Petitioner's liability, Petitioner again denies all liability under the statute for any and all alleged, and unproven, hazardous substances at the Site.[4] Specifically, Petitioner denies Respondents' wholly unsupported statement that: "Pursuant to the [insurance] policy, petitioner agreed to have removed from the property certain debris, including fluids and oils contained in several electrical transformers." Resp. Br. 5. *There is absolutely no evidence in the record that supports the contention that Petitioner "agreed to remove" any material.*

To the contrary, in the only case where the Agency *attempted* to prove that proposition, Chief Administrative Law Judge Jon G. Lotis *dismissed* that claim against Petitioner as meritless. See *In the Matter of Employers Insurance Company of Wausau, et al.*, Docket No. TSCA-V-C-62-90, Initial Decision, Slip Op. at 3, 18-19 (EPA Sept. 29, 1995) ("Wausau did not engage in the disposal of the transformers. Accordingly, the charge against it is

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[4] Obviously, the Agency "determined" Petitioner's unproven liability. If it did not, then the CERCLA § 106(a) unilateral administrative order was, on its face, unenforceable, arbitrary, capricious and unlawful. See CERCLA § 106(a).

dismissed"; "Wausau was obligated *to pay* only for the removal of fire damaged property covered under the contract. And, independent of that contract, Wausau took no action affecting the draining and removal of the [PCB-containing] Niagara transformer") (emphasis added).

II.

THE SEVENTH CIRCUIT'S RULING AS TO THE SCOPE OF CERCLA LIABILITY CONFLICTS WITH DECISIONS OF THE SECOND, THIRD AND FIFTH CIRCUITS.

Again, rather than address the Seventh Circuit's holding concerning the scope of CERCLA liability, Respondents avoid the issue by asserting that the Agency (and thus the Court) never "considered petitioner's liability under" CERCLA. Resp. Br. 13. Although conceding that a CERCLA § 106 order is an "enforcement" mechanism, Respondents contend that the order issued to Petitioner "did not purport to impose or apportion liability." Resp. Br. I, 14. The order itself, however, set forth the Agency's "determinations," charging therein that Petitioner had "arranged for disposal or transport for disposal of hazardous substances at the CIW Site" and thus was a "liable person[ ] under Section 107(a)." See also the Agency's unilateral "findings" that allegedly supported these "determinations."[5] C.A. Consol. App. B at 2-6. Unquestionably, Respondents recognize that the liability the

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[5] CERCLA § 106(b)(2) confirms that the Agency necessarily makes liability determinations in issuing CERCLA § 106 orders. That provision presumes the liability of a party seeking reimbursement, based on the Agency's administrative determination, and places the burden on such a party to "establish . . . that it is not liable . . . under section 107(a)." CERCLA § 106(b)(2)(C).

Agency unilaterally imposed was, in fact, joint and several:

> E A insisted that both the order and the [work plan] *required* petitioner to clean up *all hazardous substances* located at the site, *whether or not they were contaminated by PCBs.*

Resp. Br. 6 (emphasis added).

The Seventh Circuit's ruling that the Agency has the authority to unilaterally impose joint and several liability administratively, in a case where the harm at issue is clearly and easily divisible (Pet. App. 4, 54-55 n.13), squarely conflicts with decisions of the Second, Third and Fifth Circuits. *Compare* Pet. App. 12-13 *with In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901-02 (5th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722-23 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-70 (3d Cir. 1992). If this Court follows the Second, Third and Fifth Circuits, Congress need not consider reform legislation to check the Agency's enforcement practices under the statute.

III.

THE SEVENTH CIRCUIT'S REFUSAL TO AFFORD PETITIONER A POST-DEPRIVATION HEARING ON ITS ALLEGED CERCLA LIABILITY DIRECTLY CONFLICTS WITH A RULING IN THE FIRST CIRCUIT.

In dismissing Petitioner's due process claims, the Seventh Circuit relied solely on decisions upholding the constitutionality of *penalties* that *may be imposed* on a party for failure to comply with a CERCLA § 106 order. See Pet. App. 11 (citing *Solid State Circuits, Inc. v. United States Environmental Prot. Agency*, 812 F.2d 383, 389-92

(8th Cir. 1987)); *see also* Resp. Br. 10-11. The deprivation at issue here is critically different than a potential, prospective penalty. In this case, through the Agency's unilateral administrative actions, Petitioner has suffered an *actual* (not speculative) deprivation of its property (i.e., in excess of $2 million). The distinction between *potential penalties* and Petitioner's actual loss was simply ignored by the courts below. By insulating the Agency's administrative determination of Petitioner's disputed liability from review, the Seventh Circuit's decision conflicts with the First Circuit's conclusion that CERCLA's administrative procedures cannot deny a party a timely, *post-deprivation*, judicial hearing on its alleged liability.[6] See *United States v. Reardon*, 947 F.2d 1509, 1523-24 (1st Cir. 1991) (*en banc*).

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[6] Even the Seventh Circuit's authority does not support the Court's conclusion. See *Solid State Circuits*, 812 F.2d at 387, 389 n. 9 (parties can "perform any required clean-up, *with the assurances* that if . . . they are not a responsible party, recovery may be had from the Superfund" pursuant to a "judicial determination of [their] rights and liabilities") (emphasis added).

IV.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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